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961007 DEC 23 1996

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No. ____

In The

Supreme Court of the United States

October Term, 1996

DONNA S. OLIVER, Administratrix of the Estate of ARTHUR DWAYNE OLIVER,

Petitioner,

v.

OSHKOSH TRUCK CORPORATION,

Respondent.

ERIK B. TATE and SHIRL D. O'BRIEN-TATE,

Petitioners,

v.

OSHKOSH TRUCK CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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115 pp

QUESTIONS PRESENTED

I. Whether the government contractor defense provides immunity from a failure to warn claim where warnings of the danger at issue are neither required nor prohibited by the Government?

II. Whether the court is the appropriate finder of fact as to the existence of the elements of the government contractor defense?

III. Whether the government contractor defense is available to a manufacturer who accepts total design responsibility as a term of the contract?

IV. Whether the government contractor defense is available to a manufacturer whose design violates express terms of the contract?

V. Whether the government contractor defense is available to a manufacturer who fails to warn the government of known dangers?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment in sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Donna S. Oliver, Administratrix of the Estate of Arthur Dwayne Oliver and Erik B. Tate and Shirl D. O'Brien-Tate, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 96 F.3d 992 and is reproduced in the Appendix filed herewith ("App.") at 1a. The opinion of the U.S. District Court is reported at 911 F.Supp. 1161 and is reproduced in the Appendix filed herewith at 27a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on September 23, 1996. The Petition for Rehearing was denied on October 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On March 22, 1991, Corporal Arthur Oliver and Corporal Erik Tate were on military assignment with the United States Marine Corps in Saudi Arabia. Their unit was transporting food supplies from Saudi Arabia to Kuwait. Corporal Oliver was driving the fifth of thirteen MK-48 transport vehicles in the supply convoy; Corporal

Tate was riding in the passenger seat.[1] Poor visibility from blowing dust caused the convoy to slow and, eventually, to stop. When the convoy stopped, Corporal Oliver was unable to stop his MK-48 in time to avoid a collision. His vehicle, which was traveling approximately 10 mph, struck the right side of another MK-48 at the point where the fuel tank and exhaust pipe were located. An explosion followed. Corporal Oliver died from the burns he received in the crash. Corporal Tate suffered third degree burns over most of his body, requiring the amputation of his left leg above the knee.

Corporal Oliver's estate and Corporal Tate (hereinafter Oliver and Tate) brought separate product liability actions against Oshkosh Truck Corporation (hereinafter Oshkosh), the manufacturer of the MK-48. Oliver and Tate offered evidence that the muffler on the MK-48 was located dangerously close to the right side fuel tank. The MK-48 has two exposed 75 gallon fuel tanks, one located on each side of the vehicle. A single exhaust pipe is located on the right side of the vehicle and is positioned directly above and parallel to the right side fuel tank. At its closest point, the exhaust pipe is 1.5 inches from the fuel tank.

During the late 1970's, the United States Marine Corps undertook a review of its transportation needs and concluded that the heavy duty truck segment of the existing fleet was inadequate to meet its future needs. In

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[1] The MK-48 is the front power unit of the MK-48-14, a fully articulated 8 X 8 logistical support vehicle. The MK-14 is a flatbed trailer which is detachable from the MK-48 and can operate on its own power.

1978, the Marine Corps attempted to determine what existing vehicles were commercially available to fulfill its transportation needs. Twenty-one companies including Oshkosh responded to the Marine Corps' ¸uery (R. Ex. Vol. I, Tab 12, p. 17). Various companies were then invited to submit prototype vehicles to be tested, in order to determine whether they could perform the functions the Marine Corps envisioned (*Id.*). The purpose of these efforts was to locate vehicles which would not require government design and would utilize readily available commercial componentry (R. Ex. Vol. I, Tab 13, p. 2). The decision to purchase the MK-48 (then known as the Dragon Wagon) from Oshkosh was made because it was "the only developed, tested, and commercially available articulated truck design in existence which would meet the Marine Corps' military mission . . . [a] comparable commercial truck is not available from any other source" (R. Ex. Vol. I, Tab 44). Although performance testing identified literally hundreds of changes that would have to be made before a production contract was awarded to Oshkosh, the discovery of the Oshkosh design resulted in ending the traditional research, development and acquisition process formerly followed by the Marine Corps (R. Ex. Vol. I, Tab 12, p. 19). None of the changes identified by the government related to the configuration of the fuel tanks and the exhaust system, which remained constant through the testing and production phases of the procurement process.

There were no government performance specifications that required the muffler to be on top of the gas tank (Depo. of Maj. John Wozniak, pp. 73, 127). The military had no input in the design of the vehicle in terms

of where the muffler would be placed in relation to the gas tank. (*Id.*, p. 129). The placement of the exhaust system was decided upon by Oshkosh in order to have the vehicle fit within the dimensional requirements of the contract. Oliver and Tate introduced evidence of alternative designs which would have placed the muffler in a safer area (R. 31, p. 5), and which were permitted by the contract (R. 32, Tab E-2, p. 42).

The production contract eventually entered into between Oshkosh and the Marine Corps provides that Oshkosh has "total design responsibility" and that "the submission and approval or disapproval by the government of any changes shall in no way relieve [Oshkosh] of this total design responsibility" (R. 23, Ex. E, at ¶C.6.1). According to the military officer responsible for administering the contract, the total design responsibility provision was intended to insure that Oshkosh, rather than the government, would be responsible for the design of the vehicle (Depo. of Maj. John Wozniak, p. 70).

In addition to its other provisions, the contract between Oshkosh and the Marine Corps required that the MK-48 must comply with Federal Motor Carrier Safety Regulation 393.83 and must be complete in all respects as would normally be delivered in the commercial heavy truck transport industry.[2] Oliver and Tate produced evidence that the configuration of the exhaust and fuel

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[2] FMCSR § 393.83 provides that "no part [of an exhaust system] shall be located where its location would likely result in burning, charring, or damaging the electrical wiring, the fuel supply, or any combustible part of the motor vehicle." 49 C.F.R. § 393.83.

systems decided upon by Oshkosh made the vehicle more likely to burn in a crash (R. Ex. Vol. I, Tab 23, ¶5; Depo. of Tom Lalk, pp. 73-74). The chief engineer for the MK-48, Danny Lanzdorf, agreed that locating the exhaust over the fuel tank makes the vehicle more likely to burn in a crash (Depo. of Danny J. Lanzdorf, pp. 81-82). Oliver and Tate also presented evidence that the MK-48 as designed by Oshkosh was not complete in all respects since it is more likely to burn in a crash and is not as crashworthy as a truck that would normally be delivered to the commercial heavy truck transport industry (R. Ex. Vol. I, Tab 23, ¶6; Depo. of Tom Lalk, pp. 71-72). It was Oshkosh's responsibility to fulfill these requirements relating to safety of the vehicle (Depo. of Maj. John Wozniak, p. 74). The government did no independent analysis or testing to determine whether the federal regulations were complied with (*Id.*, p. 90). The government relied upon OTC to insure that the vehicle was in compliance (*Id.*, pp. 90-91). If Oshkosh failed to produce a vehicle that was in compliance with the Federal Motor Carrier Safety Regulations, then it failed to comply with one of the contract specifications (*Id.*, p. 92).

Oshkosh sought summary judgment on the basis of the government contractor defense. The parties submitted evidence directed to the contractual relationship between Oshkosh and the United States Marine Corps during the process of acquisition. The District Court ruled that the elements of the government contractor defense were established as a matter of law, and granted summary judgment. The Seventh Circuit also determined as a matter of law that the government controlled the placement

and configuration of the exhaust and fuel system to such an extent as to immunize Oshkosh from liability.

REASONS FOR GRANTING THE WRIT

I. A CONFLICT EXISTS AMONG THE COURTS OF APPEALS AS TO WHEN AND HOW THE GOVERNMENT CONTRACTOR DEFENSE APPLIES TO A CLAIM FOR FAILURE TO WARN.

A. THE LOWER FEDERAL COURTS HAVE DEVELOPED THREE SEPARATE AND CONFLICTING TESTS FOR APPLYING THE GOVERNMENT CONTRACTOR DEFENSE TO CLAIMS FOR FA1LURE TO WARN.

A government contractor is not subject to liability for design defects in its product where the government approved reasonably precise specifications for the design feature at issue; the product complied with those specifications; and the contractor warned the government of all dangers of the design of which the contractor knew but the government did not. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). This Court's holding in *Boyle* did not address the applicability of the government contractor defense to claims for failure to warn under state tort law. *Boyle* involved only design defect claims, and the Court was therefore not called upon to rule on the contours of the government contractor defense as applied to failure to warn claims. Nor does the third element of the *Boyle* test resolve the issue of the state law duty to warn. The government contractor defense requires that the contractor warn the

government of dangers of which it has actual knowledge. Failure to warn claims under state tort law require that a manufacturer warn users of its product about dangers of which it knew or should have known. *E.g. Flaminio v. Honda Motor Co.. Ltd.*, 733 F.2d 463 (7th Cir. 1984); *Schuh v. Fox River Tractor Co.*, 63 Wis.2d 728, 739, 218 N.W.2d 279 (1974).

In the absence of an authoritative statement from this Court, the lower federal courts have developed their own jurisprudence on the applicability of the government contractor defense to state tort law claims for failure to warn. The various courts have generally agreed that, under some circumstances, a government contractor may be immune from liability for failure to warn. There is little agreement on what those circumstances may be. Basically, three tests for application of a government contractor defense have been developed.

The first test is that applied by the Second, Fifth, Ninth and Eleventh Circuits. These courts require that, before a manufacturer may invoke the government contractor defense, the government must by its specifications either dictate, control or affirmatively prohibit warnings on the aspect of the design at issue. *In re: Joint E. & S. District New York Asbestos Litigation*, 897 F.2d 626, 629-630 (2d Cir. 1990); *In re: Air Disaster at Ramstein Air Base Germany*, 81 F.3d 570 (5th Cir. 1996); *Butler v. Ingalls Shipbuilding, Inc.*, 89 F.3d 582 (9th Cir. 1996); *In re: Hawaii Federal Asbestos Cases*, 960 F.2d 806, 812-13 (9th Cir. 1992); *Dorse v. Eagle-Pilcher Industries, Inc.*, 898 F.2d 1487, 1489 (11th Cir. 1990). The rationale of these decisions is that where no conflict exists between requirements imposed under a federal contract and a state law duty to warn

(regardless of any conflict between the contract and state law design requirements), *Boyle* requires deference to the operation of state law. *New York Asbestos Litigation*, 897 F.2d at 631. In other words the state imposed duty of care that is the asserted basis of the contractor's liability for failure to warn is not precisely contrary to the duty imposed by the government contract. *Dorse*, 898 F.2d at 1489.

The Sixth Circuit has expressly rejected this line of cases in favor of its own formulation. This test, adopted by the Seventh Circuit in this case and followed by district courts in the Tenth Circuit, merely applies the elements of the *Boyle* defense to the claim of failure to warn. *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1156 (6th Cir. 1995); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 1003 (7th Cir., 1996); *Wisner v. Unisys Corp.*, 917 F.Supp. 1501, 1512 (D.Kan. 1996). If (1) the United States exercised its discretion and approved warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not; then the defense applies. *Tate*, 55 F.3d at 1157.

Yet another test, rejecting both of the previous tests, has been adopted by at least one district court in the Third Circuit. Under that formulation, where the contractor and government have equal knowledge of the risk of injury, and the government approves a reasonably precise specification that includes no warnings, the government contractor defense is applicable. *Russek v. Unisys Corp.*, 921 F.Supp. 1277, 1294 (D.N.J. 1996), Where the manufacturer has established a *Boyle* defense to the design defect,

and the relevant specifications are silent as to warnings, *Boyle* bars the failure to warn claim as well. *Id.*, at 1293.

Absent direction from this Court, the lower federal courts will continue to diverge in their application of the government contractor defense to claims of failure to warn under state law and will continue to reach contradictory conclusions in such cases. Each of the three tests described above has been considered and applied in rulings handed down this year. This Court should accept certiorari in order to provide guidance and clarification on this important point of law.

B. THE TEST ADOPTED BY THE SEVENTH CIRCUIT FAILS TO CONSIDER WHETHER THE STATE LAW DUTY TO WARN CONFLICTS WITH THE DUTIES ASSUMED UNDER THE CONTRACT.

In defining the contours of the government contractor defense, this Court was careful to note that immunity for government contractors was the exception rather than the rule. In many situations the defense would not be available at all. Those situations included: (1) where the effect of the litigation would be to enforce the same standards called for under the contract; (2) where the tort standards, while not identical to the contract standards, nonetheless are not in conflict with the federal standards; and (3) where the federal standard is incidental, and not actually related to a significant federal interest. *Boyle*, 487 U.S. at 508-509, 108 S.Ct. at 2516. The Court's analysis established that there would be no government contractor defense unless the state tort duty being advocated

actually conflicted with a significant federal interest: "conflict there must be". *Id.* Absent such conflict, "no one suggests that State law would generally be preempted". *Id.*

The three-prong *Boyle* analysis serves to avoid unnecessary preemption of state tort law by ensuring that there is an actual conflict between the discretion exercised by government officials in considering the *design* of military equipment and the duties imposed under state law. In the field of design, it is obvious that once a federal official considers and approves a particular design feature he has rejected all other possible designs. The same is not true in the field of warnings. The fact that a government official wants a warning issued about a danger of which she is aware says nothing about how she would exercise her discretion as to other warnings which she has not considered relating to dangers of which she is unaware. To infer from warnings on one subject that other warnings are forbidden is illogical: a decision that users of the product must be warned of one danger precludes their being warned of others.

By requiring that the contractor inform the government of dangers attending to the equipment of which it knows but the government does not, the third prong of *Boyle* insures that the government makes an informed decision to contract. By contrast, a state tort law duty to warn accomplishes an entirely different objective of assisting those who use or come into contact with equipment to protect their own safety. Apart from the common use of the word "warn" the two duties have absolutely no similarity to one another. *New York Asbestos Litigation*, 897 F.2d at 632. The failure of the government to make a

decision on warnings demonstrates the absence of a discretionary decision, rather than an immunized discretionary function itself. *Dube v. Pittsburgh Corning*, 870 F.2d 790, 800 (1st Cir. 1989).

Application of the *Boyle* analysis to claims of failure to warn does not ensure that the preemptive effect of the government contractor defense is limited to cases of actual conflict. The Seventh Circuit precluded Oliver's and Tate's failure to warn claims because the Marine Corps had considered certain warnings about the heat of the exhaust and the flammability of fuel that were placed on the MK-48 (App., 24a-25a). The court had earlier found, however, that these warnings *did not* show that the Marine Corps was aware of the danger of the exhaust system configuration. In holding that the warning requirement of *Boyle* was established as a matter of law, the court had already ruled that *neither* Oshkosh nor the government knew of this danger (App., 17a). Application of the *Boyle* analysis thus leads to preemption of state tort law where *no evidence* supports a conclusion that government officials exercised their discretion. The test followed by the Sixth, Seventh and Tenth Circuits is therefore insufficiently respectful of the authority of state law.

Even less deferential to state sovereignty is the test adopted by the District of New Jersey. Essentially, that court held that there can be no state tort duty to warn for contractors providing equipment to the government. *Russek*, 921 F.Supp. at 1293. That court infers from governmental silence on warnings that no warnings are to be issued. In such a case, however, the contractor can comply with its duty to provide adequate warnings while at the same time meeting the contractual requirements. The

essential element of the government contractor defense, a conflict between state and federal duties, is absent. Silence by the government as to warnings means no conflict exists.

The majority of Circuit Courts of Appeals addressing the issue have developed a test which ensures that such conflict is present before preempting state tort law. Stripped to its essentials, the military contractor defense under *Boyle* is to claim "the government made me do it". *New York Asbestos Litigation*, 897 F.2d at 632. Only where the government actually considered a warning and rejected it, or forbade other warnings, would such a conflict arise. *Butler*, 89 F.3d at 586. It is only *then* that the contractor's state duty (and ability) to warn conflicts with its federal obligation. The test followed by the majority of circuits ensures proper deference to state tort law while at the same time protecting actual exercises of discretion by government officials.

An appropriate warning in this case would likely have prevented the injuries to Oliver and Tate. The MK-48 was designed to travel in convoys (Depo. of Danny Lanzdorf, pp. 65-67). It was intended to be used in conditions where visibility might be poor (*Id.*). A vehicle to vehicle side impact between MK-48s was foreseeable (*Id.*, p. 60; Depo. of Henry C. Hodges, p. 50). The mission brief for the convoy in which Oliver was killed and Tate was injured required that the interval of the 13 MK-48s be 100 meters minimum and that they travel at a speed of 25 miles per hour (R. Ex. Vol. 1, Tab 36, p. 6; Depo. of Jason Windle, p. 55). Oshkosh's own expert testified that the convoy should have been travelling slower and with greater intervals (Depo. of Herbert Dobbs, pp. 53-54). The

expert admitted that a convoy commander planning a mission would need and want information that the MK-48 was more likely to burn in a crash (*Id.*, pp. 88-89). If the convoy commander had known of the danger, he could have taken steps to avoid the collision altogether.

Despite its finding that the Marine Corps did not know of this danger, the Seventh Circuit ruled as a matter of law that Oshkosh was forbidden from providing that knowledge to Oliver's and Tate's convoy commander. This is because, the court concluded, the Marine Corps' approval of some warnings prohibited all other warnings as a matter of law under the contract. The Seventh Circuit failed to address the fact that, *after* Oliver was killed and Tate was gravely wounded, Oshkosh unilaterally issued warnings of the danger of the exhaust system configuration (R. Ex. Vol. 1, Tab 33, p. 3; R. 40; R. Ex. Vol. 1, Tab 34, pp. 1-2).

As originally formulated by this Court, the government contractor defense requires that the government exercise discretion as to the design feature at issue. 487 U.S. at 512, 108 S.Ct. at 2518; *Bailey v. McDonnell-Douglas Corp.*, 989 F.2d 794, 799 (5th Cir. 1993); *Gray v. Lockheed Aeronautical Systems Co.*, 880 F.Supp. 1559, 1566 (N.D.Ga. 1995); *Barron v. Martin Marietta Corp.*, 868 F.Supp. 1203, 1207 (N.D.Cal. 1994); *Johnson v. Grumman Corp.*, 806 F.Supp. 212, 217 (W.D.Wis. 1992). The Seventh Circuit's disposition of the failure to warn claim reaches the opposite result; if the government approved any warnings, it does not matter that it did not consider warnings concerning the design attribute at issue. This test results in needless preemption of state law. It should be rejected by this Court.

The conflict among the Circuits provides a compelling reason for this Court to grant the Writ and to provide guidance to the federal appellate courts as to which test is most appropriate. The conflict in the circuits is clear and irreconcilable. Certiorari is appropriate.

II. THE TRIAL COURT AND THE SEVENTH CIRCUIT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS BY ASSUMING THE ROLE OF FACTFINDER AS TO THE APPLICATION OF THE GOVERNMENT CONTRACTOR DEFENSE.

A. THE LOWER COURTS USURPED THE ROLE OF THE JURY IN CONFLICT WITH THIS COURT'S DECISION IN *BOYLE*.

As formulated by this Court, the government contractor defense is a defense of fact, and not of law. Whether the elements of the defense have been established in a particular case is a question of fact for jury determination. *Boyle*, 487 U.S. at 514, 108 S.Ct. at 2519. *See also Carley v. Wheeled Coach*, 991 F.2d 1117, 1127 (3rd Cir. 1993); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir. 1989); *Garner v. Santoro*, 865 F.2d 629, 636 (5th Cir. 1989); *Johnson v. Grumman Corp.*, 806 F.Supp. 212, 218 (W.D.Wis. 1992). The contractor asserting the defense has the burden of proving each element. *Carley*, 991 F.2d at 1125; *Bailey v. McDonnell-Douglas Corp.*, 989 F.2d 794, 802 (5th Cir. 1993).

At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Id.* at 255, 106 S.Ct. at 2513. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456, 112 S.Ct. 2072, 2076, 119 L.Ed.2d 265 (1992).

Neither of the courts below limited themselves to the appropriate judicial role in ruling on a motion for summary judgment raising the government contractor defense. Indeed, each court below expressly eschewed any limitation on its authority and declared itself to be a factfinder. The District Court stated:

> First, I must determine whether the government has delegated, and to what extent, discretion over the product design to the contractor. Along that line, I also must ask whether the government's approval, if any, was meaningful or merely a formality. And thirdly, I must determine whether the specifications were reasonably precise (App., 43a).

Similarly, the Seventh Circuit announced:

> We must determine whether, and to what extent, the Marine Corps delegated discretion over the design of the MK-48 to Oshkosh. We also must discern whether the Marine Corps' approval of the design was meaningful, or merely a formality, and whether the specifications at issue were reasonably precise (App., 9a).

By these statements, the lower courts demonstrated their lack of understanding that the jury even has a role in deciding the applicability of the government contractor defense, much less that the jury's role predominates over that of the court.

The lower courts did not limit themselves to determining whether a factual issue existed as to the elements of the government contractor defense. Instead, they made factual findings that those elements were established. As exemplified below, those findings involved and required interpretations of evidence in favor of the contractor. The courts ignored or minimized the importance of evidence submitted by Oliver and Tate. Evidentiary disputes exist on each element of the government contractor defense. In essence, the lower courts held that, because Oliver and Tate could not win summary judgment on each element of the defense, Oshkosh was entitled to judgment as a matter of law. This is a gross departure from the proceedings mandated by this Court's formulation of the government contractor defense, as well as the law of summary judgment. Exercise of this Court's supervisory powers is warranted.

B. GENUINE ISSUES OF FACT EXIST ON EVERY ELEMENT OF THE GOVERNMENT CONTRACTOR DEFENSE.

In *Boyle*, this Court held that three facts must be established in order for the government contractor defense to provide immunity from an allegation of design defect. First, the United States must have approved reasonably precise specifications for the design attribute at

issue. Second, the product must comply with the specifications established by the United States. Finally, the contractor must have warned the United States of all dangers inherent in the design of the product of which it knew but of which the government was unaware. While full development of the facts presented by Oliver and Tate should properly await the brief on the merits, the existence of factual issues is obviously central to the question of whether this Court should exercise its supervisory powers. Accordingly, it is useful to examine some of the evidence offered by Oliver and Tate that was ignored or found insufficient by the lower courts.

The Seventh Circuit acknowledged that the contract under which the MK-48 was purchased delegated total design responsibility to Oshkosh as the contractor (App., 5a), and that the submission and approval or disapproval by the government of any changes shall in no way relieve [Oshkosh] of this total design responsibility (*Id.*). Oliver and Tate also introduced direct testimony from the responsible government official that the Marine Corps never approved specifications for the location of the exhaust or required that it be located where it was (Depo. of Maj. John Wozniak, pp. 73, 127, 129). It may overstate the obvious to contend that the Seventh Circuit must have found this evidence to be entitled to little weight in order to find the defense established as a matter of law.

Instead, the Seventh Circuit concentrated on the *general* back and forth process that occurred between Oshkosh and the Marine Corps prior to the signing of the purchase contract (App., 10a). In doing so, however, the court overlooked the evidence that the purpose of this back and forth process was to secure for the government

the latest commercial technology without the government having to exercise control over the design process (E.g. R. Ex. Vol. 1, Tab 12, pp. 13, 17; Depo. of Maj. John Wozniak, p. 70). The Seventh Circuit also focused on a mix of performance criteria which it determined sufficiently limited the design discretion of Oshkosh to *amount to* approval of reasonably precise specifications (App., 10a-12a). It is difficult to conceive of a more striking example of a factual inference being drawn in favor of the party moving for summary judgment. The inference was not required by the evidence because Oliver and Tate introduced expert testimony and evidence of existing alternative designs to show that the placement of the exhaust decided upon by Oshkosh was not required by the Marine Corps' performance specifications (E.g. R. 31, p. 5; R. 32, Tab E2, p. 42).

Still, the express language of the purchase contract was troubling to the Seventh Circuit. It therefore weighed the contract language as insubstantial, in a footnote, by holding that government approval of the design occurred prior to the existence of the purchase contract (App., pp. 13a-14a, n. 4). In holding that the contractual terms are irrelevant to the government contractor defense, the court with the stroke of a pen eliminated the discretion of government officials to require by contract that their contractors accept liability for design decisions. The court also ignored the evidence that the prototype contract expressly anticipated that the relationship would be governed by the purchase contract (R. 32, Tab C, pp. 2, 9). By holding the contract language to be meaningless, the court mooted Oshkosh's efforts to have the total design

responsibility language removed from the purchase contract prior to its signing (R. Ex. Vol. 1, Tab 16, pp. 1-2; Depo. of Lloyd Rank, pp. 29-30; R. Ex. Vol. 1, Tab 45, p. 7). The court was unable to identify any instance of government consideration of the location of the exhaust, or any particular specification requiring it be located as designed by Oshkosh.

Similar evidentiary determinations underlay the lower courts' rulings that the MK-48 complied with government specifications. The Seventh Circuit ruled that, because it had previously found that the government approved reasonably precise specifications, it was foreclosed from determining that the design did not meet contract specifications (App., 15a-16a). Of course, the court's finding of fact on the first element of the government contractor defense did not encompass the design's compliance with *all* provisions of the contract; the court merely held that the dimensional and performance requirements imposed by the government created some non-total degree of limitation on the configuration chosen by Oshkosh (App., 12a). Determination of whether the design met the requirements of completeness in all respects and compliance with Federal Motor Carrier Safety Regulations was not foreclosed by the previous factual determination. Direct testimony was presented that the government's acceptance of the vehicle as designed was not a determination of compliance with these provisions (Depo. of Maj. John Wozniak, pp. 89-92, 108-109). Expert testimony offered by Oliver and Tate established that the vehicle as designed did not comply with Federal Motor Carrier Safety Regulations (R. Ex. Vol. 1, Tab 23, ¶5; Depo. of Tom Lalk, pp. 73-74). Thus, despite

evidence that the government did not determine whether the design complied with certain provisions of the contract, and expert testimony that the design violated specific contractual provisions, the lower courts determined as a matter of law that the MK-48 complied with government specifications. This finding of fact was unwarranted.

The lower courts' holding that Oshkosh warned the government of all dangers of which it knew and the government did not is the clearest demonstration of their resolution of disputed factual issues properly reserved for the jury. Indeed, while reaching the same result on this element of the government contractor defense, the trial court and the Seventh Circuit made diametrically opposing factual determinations. The trial court expressly found that Oshkosh knew that the MK-48 was more likely to burn in a crash than other vehicles because of the location of the exhaust in such close proximity to the fuel tank (App., p. 73a). The Seventh Circuit found as a matter of law that Oshkosh *did not* know this to be true (App., p. 17a). The District Court determined that the Marine Corps *also* knew the vehicle was more likely to burn in a crash (App., p. 73a). The Seventh Circuit again found the opposite to be true (App., p. 17a). Oliver and Tate presented deposition testimony from Oshkosh's chief engineer that the company knew the vehicle was more likely to burn in a crash (Depo. of Danny Lanzdorf, pp. 81-82). No direct evidence in the record addressed the government's knowledge of this danger, although the evidence that was introduced strongly supports an inference that the government did not know (Depo. of Maj. John Wozniak, pp. 89-92, 108-109).

Having expressly adopted the role of factfinder, it is unsurprising that the courts below made inferences of fact in favor of Oshkosh and evaluated the evidence introduced by Oliver and Tate as having little weight. In doing so, the courts succeeded in rendering express terms contained in the contract between Oshkosh and the Marine Corps meaningless. Such a result is unwarranted, and should not have occurred because the proper role of the courts on Oshkosh's motion for summary judgment should have been limited to determining whether genuine issues of material fact existed. Both the District Court and the Seventh Circuit departed greatly from the normal and accepted course of proceedings on motion for summary judgment. Their departure caused them to render decisions in conflict with this Court's formulation of the government contractor defense. The Court should exercise its supervisory authority to reaffirm the appropriate role of courts ruling on motions for summary judgment.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 96-1320

DONNA S. OLIVER, Administratrix of the Estate of ARTHUR DWAYNE OLIVER,

Plaintiff-Appellant,

v.

OSHKOSH TRUCK CORPORATION,

Defendant-Appellee.

No. 96-1321

ERIK B. TATE and SHIRL D. O'BRIEN-TATE,

Plaintiffs-Appellants,

v.

OSHKOSH TRUCK CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
Nos. 93 C 206, 93 C 43 – **J. P. Stadtmueller,** *Chief Judge.*

ARGUED MAY 29, 1996 – DECIDED SEPTEMBER 23, 1996

Before COFFEY, RIPPLE and MANION, *Circuit Judges.*

RIPPLE, *Circuit Judge*. While on military assignment with the United States Marine Corps in Saudi Arabia, Corporal Arthur Oliver was killed when the MK-48 logistical support vehicle he was driving crashed and burned during a convoy operation. Corporal Erik Tate, who was riding in the MK-48, suffered severe burns in the crash. Each commenced separate products liability actions against Oshkosh Truck Corporation ("Oshkosh"), the manufacturer of the MK-48. The district court granted Oshkosh's motions for summary judgment on the basis of the government contractor defense articulated by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The plaintiffs now appeal the district court's entry of summary judgment. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I

BACKGROUND

On March 22, 1991, Corporal Arthur Oliver and Corporal Erik Tate were on military assignment with the United States Marine Corps in Saudi Arabia. Their unit was transporting food supplies from Saudi Arabia to Kuwait. Corporal Oliver was driving the fifth of thirteen MK-48 transport vehicles in the supply convoy; Corporal Tate was riding in the passenger seat.[1] Poor visibility

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[1] The MK-48 is the front power unit of the MK-48-14, a fully articulated 8 X 8 logistical support vehicle. The "MK-14" is a flatbed trailer which is detachable from the MK-48 and can operate on its own power.

from blowing dust caused the convoy to slow and, eventually, to stop. When the convoy stopped, Corporal Oliver was unable to stop his MK-48 in time to avoid a collision. His vehicle struck the right side of another MK-48 at the point where the fuel tank and exhaust pipe were located. An explosion followed. Corporal Oliver died from the burns he received in the crash. Corporal Tate suffered third-degree burns over most of his body, requiring the amputation of his left leg above the knee.

Corporal Oliver's estate and Corporal Tate brought separate product liability actions against Oshkosh, the manufacturer of the MK-48. The plaintiffs alleged that the muffler on the MK-48 was located dangerously close to the right side fuel tank. The MK-48 has two exposed seventy-five gallon fuel tanks located on each side of the vehicle. A single exhaust pipe is located on the right side of the vehicle and is positioned directly above and parallel to the right-side fuel tank. At its closest point, the exhaust pipe is 1.5 inches from the fuel tank.

Oshkosh sought summary judgment on the basis of the government contractor defense established by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). Because the government contractor defense depends significantly on the extent of government participation in the design of the product in question, the parties' submissions to the district court focused on the design, testing and production phases of the MK-48 procurement process.

The materials submitted to the district court establish that, during the late 1970's, the United States Marine Corps undertook a review of its transportation needs and

concluded that the heavy-duty truck segment of the existing fleet was inadequate to meet its future needs. The Corps evaluated several commercially available tractors and heavy-haul trailers but quickly determined that these designs would not be suitable for the military missions envisioned for the vehicle. In December 1978, the Marine Corps announced that it was interested in obtaining information on other commercially available heavy-duty trucks and trailers. Twenty-one manufacturers, including Oshkosh, responded to the Corps' request.

The Marine Corps developed performance specifications, selection criteria and a test-planning document for the vehicle and trailer it sought. This information was distributed to the manufacturers that had responded to the earlier inquiry. In March 1980, the Corps commenced the official procurement process by publishing a Request For Proposals ("RFP") to find a manufacturer to build a prototype MK-48. The RFP defined operational, performance and containment specifications for the vehicle sought by the Corps. Ten manufacturers, including Oshkosh, responded to the RFP by submitting proposals. A Source Evaluation Committee, consisting of non-contracting civilian and military engineers, evaluated the proposals and recommended that Oshkosh be awarded the prototype contract. Oshkosh delivered two prototype MK-48s to the Marine Corps in April 1981.

The Marine Corps assumed complete responsibility for testing the prototype MK-48s. The Corps subjected the prototypes to extensive operational, performance and durability testing and identified "literally . . . hundreds" of changes that would have to be made before a production contract was awarded. R.54, Deposition of Major

John L. Wozniak, at 26. These changes were identified by the Marine Corps, conveyed to Oshkosh, and then integrated into the MK-48 design by Oshkosh. Oshkosh made all of the design changes requested by the Marines and, at the conclusion of the testing phase, the Marine Corps awarded Oshkosh the MK-48 production contract.

The production contract provides that Oshkosh has "total design responsibility" and that "the submission and approval or disapproval by the government of any changes shall in no way relieve [Oshkosh] of this total design responsibility." R.23, Ex.E, at ¶ C.6.1. The production contract also defined extensive performance, dimension and container requirements for the MK-48. The contract provided that, among other requirements, the MK-48 must be able to fit inside an 8' X 8' X 20' flat rack ANSI/ISO shipping container; be capable of external transport by helicopter; have the ability to ford up to five feet of water for up to five minutes; be able to restart a stalled engine while fording; have at least a forty-five degree angle of approach and departure; and have at least thirteen inches of ground clearance. In addition, the production contract provides that the MK-48 must comply with Federal Motor Carrier Safety Regulation 393.83,[2] *id.* at ¶ 3.2.9, and be "complete in all respects," *id.* at ¶ 3.1.

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[2] Federal Motor Carrier Safety Regulation 393.83 prohibits the placement of an exhaust system part where "its location would likely result in burning . . . the fuel supply." 49 C.F.R. § 393.83(a). For the complete text of FMCSR 393.83, *see infra* note 5.

The initial proposal submitted by Oshkosh contemplated a single fifty-five gallon fuel tank on the left side of the vehicle, with the exhaust system mounted on the right side. At some point in the acquisition process, however, the Marine Corps increased the fuel capacity requirement. This increase led to the addition of a second fifty-five gallon fuel tank, mounted on the right side of the vehicle. When the Marine Corps increased the fuel capacity requirement a second time, Oshkosh enlarged the fuel tanks to seventy-five gallons each. Although it is not clear at what point in the design process the two modifications of the fuel capacity requirement occurred, the evidence of record suggests that the prototype vehicles delivered by Oshkosh had the dual seventy-five gallon tank configuration. Major John Wozniak, the Marine officer who administered the MK-48 contract, testified at his deposition that the Marine Corps did not request any changes in the location of the fuel tanks during the testing of the prototypes; the configuration of the fuel tanks and the exhaust system remained constant through the testing and production phases of the procurement process.

The district court granted Oshkosh's motion for summary judgment. The court took the view that, with respect to each of the plaintiffs' claims, Oshkosh had established its entitlement to the government contractor defense. Accordingly, the district court entered summary judgment in favor of Oshkosh.

II

DISCUSSION

A. *Standard of Review*

We review the district court's entry of summary judgment de novo, drawing all reasonable inferences in favor of the nonmoving party. *Bank of Illinois v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1168 (7th Cir. 1996). Under Federal Rule of Civil Procedure 56(c), "summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Normally, the burden is on the nonmoving party to establish a genuine issue of material fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In the present case, however, Oshkosh carries the burden of proving each element of the government contractor defense. *Carley v. Wheeled Coach*, 991 F.2d 1117, 1125 (3d Cir.), *cert. denied*, 510 U.S. 868 (1993). In the context of this summary judgment motion, therefore, Oshkosh must demonstrate that there is no genuine issue of material fact for each element of the defense. *Id.* In other words, Oshkosh must come forward with evidence on summary judgment which would entitle it to a directed verdict if the evidence went uncontroverted at trial.

B. *Government Contractor Defense – Design Defect Claim*

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Supreme Court held that, under certain circumstances, government contractors are shielded from state tort liability for products manufactured for the Armed Forces of the United States. There is a "significant conflict," the Supreme Court held, between state law that would hold government contractors liable for design defects in military equipment and the "uniquely federal interest" in immunizing "the trade-off between greater safety and greater combat effectiveness." *Id.* at 511-12. The government contractor defense is derived from the government's immunity from suit when the performance of a discretionary function is at issue, the Court explained, and "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function." *Id.* at 511 (citing the Federal Tort Claims Act, 28 U.S.C. § 2680(a)).

The Supreme Court established a three-part test to determine if the government contractor defense applies:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. at 512. The first two elements of the *Boyle* test ensure that "the design feature in question was considered by a Government officer, and not merely by the contractor

itself." *Id.* The third element is necessary to eliminate any incentive that the government contractor defense may create for contractors to withhold knowledge of risks.

1.

As the district court recognized, the first prong of the *Boyle* test – whether the government has "approved reasonably precise specifications" – involves a number of different considerations. We must determine whether, and to what extent, the Marine Corps delegated discretion over the design of the MK-48 to Oshkosh. We also must discern whether the Marine Corps' approval of the design was meaningful, or merely a formality, and whether the specifications at issue were reasonably precise.

Our colleagues in other circuits have enumerated some of the considerations that inform the determination of whether the government has approved "reasonably precise specifications" for purposes of the government contractor defense. In *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir.), *cert. denied*, 502 U.S. 981 (1991), the Fifth Circuit held that government contractor defense is available where "review [of the project] involved, *inter alia*, [the contractor's] submission of detailed drawings at various progressive stages of the design, critical design reviews where [government] engineers critiqued [the contractor's] work, and, finally, the production of prototype models tested and evaluated for months by the [government] for its actual performance." *Id.* at 336. The Eleventh Circuit has held that *Boyle*'s first condition is satisfied where the design of the military hardware was

the product of a " 'continuous back and forth' " between the government and the contractor. *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir. 1989) (quoting *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir.), *cert. denied*, 474 U.S. 821 (1985)), *cert. denied*, 494 U.S. 1030 (1990). Indeed, "[i]t is this salient fact of governmental participation in the various stages of the [equipment's] development that establishes the military contractor defense." *Kleeman v. McDonnell Douglas Corp.*, 890 F.2d 698, 700-01 (4th Cir. 1989), *cert. denied*, 495 U.S. 953 (1990); *see Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir.) (noting that, if the government engages in meaningful review of the design, the first element of the *Boyle* test is established), *cert. denied*, 493 U.S. 935 (1989).

With these considerations in mind, we agree with the district court that Oshkosh has satisfied the first element of the *Boyle* test. The government's participation in the design of the MK-48 was, in both a procedural and a substantive sense, extensive. Procedurally, the design of the MK-48 evolved through a cooperative and "continuous back and forth" between the Marine Corps and Oshkosh. *Harduvel*, 878 F.2d at 1320. The Marine Corps also exercised, through a detailed set of performance and dimension specifications, a considerable amount of substantive input into the design of the MK-48. The design process, viewed as a whole, establishes that the Marine Corps made a series of discretionary decisions concerning the design of the MK-48 and its suitability for military mission requirements.

The evidentiary materials submitted to the district court establish that Oshkosh and the Marine Corps worked closely together on the development of the

MK-48, from its planning stages through full production. The initial proposal called for the exhaust system to be placed on the right side of the vehicle, away from the single fifty-five gallon fuel tank on the left side. When the Marine Corps insisted upon having a larger fuel capacity, however, a second fuel tank was added to the right side of the vehicle. A second increase in the fuel capacity requirement resulted in the expansion of the twin fuel tanks to seventy-five gallons each, crowding the exhaust system even further. At one point during the design process, moreover, the government reduced the overall height limitation from 102 inches to 96 inches. This change in the height specification required the exhaust pipe, which lies directly above and parallel to the right side fuel tank, to be moved six inches closer to the fuel tank. It is clear, therefore, the Marine Corps did not leave "the critical design decisions to the private contractor," *Trevino*, 865 F.2d at 1480, but rather that the Corps worked with Oshkosh every step of the way. *See Harduvel*, 878 F.2d at 1320; *Kleeman*, 890 F.2d at 700-01.

The Marine Corps needed the MK-48 to have two seventy-five gallon fuel tanks; the ability to ford through five feet of water; the ability to restart a stalled engine while fording; the ability to fit into an 8' X 8' X 20' shipping container; and the ability to be transported externally by helicopter. This combination of specifications cabined significantly the placement of the exhaust system and the fuel tanks. Each seventy-five gallon fuel tank requires over ten cubic feet of space, and the exhaust pipe itself is approximately twelve inches in diameter. The district court was justified in concluding, as a matter of law, that this combination of specifications prevented

Oshkosh from complying "both with its contractual obligations and the state-prescribed duty of care." *Boyle*, 487 U.S. at 509; *see Harduvel*, 878 F.2d at 1316 ("Application of ordinary tort law to military designs is not appropriate, for the government 'is required by the exigencies of our defense effort to push technology toward its limits and thereby incur risks beyond those that would be acceptable for ordinary consumer goods.' ") (quoting *Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988)). Nor does the fact that Oshkosh may have retained some discretion to position the fuel tanks and exhaust system within the envelope permitted by the specifications, standing alone, defeat the government contractor defense. *See Boyle*, 487 U.S. at 513 ("The design ultimately selected may well reflect a significant policy judgment by the Government officials whether or not the contractor rather than those officials developed the design. It does not seem to us sound policy to penalize, and thus deter, active participation in the design process, placing the contractor at risk unless it identifies all design defects."); *see, e.g., Wheeled Coach*, 991 F.2d at 1125 ("Although [the applicable specification] permitted [the contractor] to place the center of gravity anywhere below the maximum height of forty-three inches, the government need not deprive the manufacturer of all discretion pertaining to a particular design feature in order for the government contractor defense to apply.").

The record is clear, moreover, that the various stages of Marine Corps approval exceeded mere rubber stamping of Oshkosh's work. *See Trevino*, 865 F.2d at 1480

("When the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion"). The Marine Corps considered – and rejected – a number of design modifications, including the integration of armor and explosion suppressant materials into the design of the fuel system.[3] This is not a case where the government simply accepted, without substantive review or evaluation, the contractor's exercise of discretion in meeting a given performance standard. *See Boyle*, 487 U.S. at 509.

The record in this case supports the district court's conclusion that, given the Marine Corps' involvement in the design process and its substantive input, the configuration of the fuel and exhaust systems amounts to the type of deliberate trade-off between military mission requirements and safety concerns that is at the heart of the government contractor defense. *See Boyle*, 487 F.2d at 511 ("[P]ermitting 'second guessing' of these [trade-off] judgments through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption [for discretionary conduct]."); *Kleeman*, 890 F.2d at 700 (same).[4]

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[3] It is not clear, however, whether the Marine Corps considered the use of armor and an explosion suppressant to address the danger of a side-impact collision.

[4] The plaintiffs submit that the production contract specifically allocates discretion for the design of the MK-48 to Oshkosh. They rely heavily on language in the production contract indicating that Oshkosh has "total design responsibility" for the MK-48 and that "submission and approval or disapproval by the government of any changes

2.

To establish the second element of the *Boyle* test, Oshkosh must demonstrate that the MK-48 conformed to the "reasonably precise specifications" approved by the government. *Boyle*, 487 U.S. at 512. The plaintiffs assert that the MK-48 failed to conform to two of the specification in the production contract: (1) the requirement that the vehicles comply with Federal Motor Carrier Safety Regulation 393.83,[5] *see* R.23, Ex.E, at ¶ 3.2.9; and (2) the requirement that the vehicles be "complete in all respects," *id.* at ¶ 3.1.[6] Specifically, the plaintiffs submit

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shall in no way relieve [Oshkosh] from complying with" this responsibility. R.23, Ex.E, at ¶ C.6.1. The interpretation of the "total responsibility clause" urged by the plaintiffs, however, is belied both by the timing of the production contract and by the conduct of the parties. At the time that the contract was executed, much of the design and substantive testing of the MK-48 had been completed; Oshkosh and the Marine Corps, working together, already had made hundreds of changes to the design of the MK-48.

[5] In relevant part, Federal Motor Carrier Safety Regulation 393.83 provides:

> **393.83 Exhaust Systems.**
>
> (a) Every motor vehicle having a device (other than as part of its cargo) capable of expelling harmful combustion fumes shall have a system to direct the discharge of such fumes. No part shall be located where its location would likely result in burning, charring, or damaging the electric wiring, the fuel supply, or any combustible part of the motor vehicle.

49 C.F.R. § 393.83(a).

[6] Paragraph 3.1 of the production contract provides, in relevant part:

that Oshkosh located the exhaust pipe where it likely will result in the ignition of the MK-48's fuel supply, in violation of FMCSR 393.83, and that, given this propensity, the MK-48 was not "complete in all respects" as ordinarily would be delivered in the heavy truck transport industry.

With respect to each of these contractual provisions, therefore, the plaintiffs rely on the assertion that the MK-48's exhaust pipe is positioned dangerously close to the right side fuel tank. As the district court correctly pointed out, the defect forming the basis of the nonconformities alleged by the plaintiffs is one of design – and not one of manufacture. The plaintiffs do not allege, for example, that one of the MK-48s involved in the accident had a fuel tank that was less sturdy than the fuel tanks installed on all of the other MK-48s manufactured by Oshkosh. Rather, it is the plaintiffs' position that, by virtue of the exhaust system and fuel tank configuration, all of the MK-48s produced by Oshkosh do not conform to the production contract. Stated differently, the plaintiffs allege that the intended configuration of these systems is capable of producing an unintended result. This is

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> **Basic Vehicle System and/or Components, Parts and Accessories.** The basic power/powered trucks or vehicle system of the type described in this specification, hereinafter referred to as "the vehicle," shall be comprised of components, parts and accessories which are standard commercial and which meet or exceed the requirements of this specification. The vehicle shall be complete in all respects, as would normally be delivered to the commercial heavy truck transport and construction equipment industry.

R.23, Ex.E, at ¶ 3.1.

the hallmark of a design defect. *See Harduvel*, 878 F.2d at 1317 (distinguishing between design and manufacturing defects in the context of the government contractor defense).

As the Eleventh Circuit explained in *Harduvel*, however, the assertion of a design defect is itself subject to the *Boyle* defense:

> To say that a product failed to conform to specifications is just another way of saying that it was defectively manufactured. . . . Plaintiff did present substantial evidence that the design – not the manufacture – of the F-16's wiring system was susceptible to dangerous wire chafing, but that claim is subject to the *Boyle* defense. The [conforming product] condition for application of the defense is present here as a matter of law.

Id. at 1321. Given our earlier conclusion that the Marine Corps approved reasonably precise specifications, it is clear that the placement of the exhaust pipe and the fuel tanks "satisfies an intended configuration." *Id.* at 1317. Oshkosh did not deviate from the Marine Corps' specifications; rather, the configuration of the fuel tanks and the exhaust system was determined, to a significant extent, by the Corps' dimension, performance and operation specifications. As in *Harduvel*, therefore, *Boyle*'s second element is present here as a matter of law.

3.

The third and final element of the government contractor defense requires the contractor to have warned the United States about the dangers in the use of the

equipment that were known to the supplier but not to the United States. *Boyle*, 487 U.S. at 512.

According to Oshkosh, the Marine Corps was aware of the dangers associated with the configuration of the exhaust and fuel systems. This knowledge, Oshkosh submits, can be inferred from the fact that the Corps considered the use of armor and explosion suppressants in connection with the fuel supply. We are unable to accept this proposition. There is no evidence that the Marine Corps considered these improvements to address the risk of an explosion caused by the proximity of the exhaust system to the fuel tanks. From all that appears, the Corps considered these improvements solely to address the risks of enemy fire and accidents during refueling. Under these circumstances, it is difficult to conclude as a matter of law that the Marine Corps possessed this knowledge. As we explain below, however, we do not believe that this factor precludes summary judgment.

We are unable to conclude that Oshkosh was aware of any danger associated with the configuration of the fuel tanks and exhaust system that the Marine Corps was not. There is no indication that Oshkosh possessed any greater knowledge than the Marine Corps concerning the likelihood of an exhaust-ignited fuel tank fire. Oshkosh did not conduct any crash tests of the MK-48, and there is no evidence of record to suggest that Oshkosh was aware of any fires or explosions arising from any collision involving the MK-48 before the accident involving Corporals Tate and Oliver. The Marine Corps was responsible for the selection and implementation of all testing for the MK-48s, and the Corps elected not to conduct any crash tests of the vehicles – before or after production.

Under these circumstances, there is no basis to believe that Oshkosh possessed any greater knowledge of the risk posed by the configuration of the exhaust pipe and the fuel tanks than did the Marine Corps. *Boyle* does not require the contractor to warn the government of every possible danger – only those known to it and not to the government. *See* 487 U.S. at 512. The evidence of record suggests that Oshkosh and the Marine Corps were equally knowledgeable concerning the likelihood of an exhaust-ignited fire following a side-impact collision and, to the extent that Oshkosh was aware of a danger from the ignition of fuel, we believe that the warnings contained in Oshkosh's Safety Assessment Report are sufficient to communicate that danger to the government for purposes of the government contractor defense.[7] On the record before us, therefore, the district court was justified in concluding that the third requirement of *Boyle* is satisfied as a matter of law. *See also Boyle*, 487 U.S. at 513.

Boyle makes clear that the government contractor defense is intended to protect military contractors from state tort liability when they produce equipment conforming to design specifications adopted by government agencies in the exercise of their discretion. On the basis of this record, we must conclude that this is such a case. Accordingly, we affirm the judgment of the district court with respect to the plaintiffs' design defect claims.

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[7] Paragraph 21 of the Safety Assessment Report warns that "[f]uel is very flammable and can explode easily" and that "[f]uel can be ignited by a hot engine." R.23, Ex.E, at ¶ 21. Additionally, the report identifies "fire from vehicle fuel" as a "significant hazard" and diesel fuel as a "hazardous material." *Id.* at ¶¶ 5.1, 5.2.

C. *Third-Party Beneficiary Claims*

The plaintiffs maintain that the government contractor defense does not preclude all of their theories of recovery against Oshkosh. Because the purpose of the government contractor defense is to prevent conflicts between state tort duties and the federal duties created by the government contract, they assert, the government contractor defense does not bar, as a matter of law, those theories of recovery that do not conflict with Oshkosh's duties under the production contract. Accordingly, the plaintiffs continue, the government contractor defense does not apply to theories of recovery based on the duties created by the government production contract itself: (1) the requirement that the MK-48 comply with FMCSR 393.83; and (2) the requirement that Oshkosh deliver a vehicle which is "complete in all respects." Specifically, the plaintiffs attempt to enforce these contractual provisions under a third-party beneficiary theory of recovery.

We believe that *Boyle* precludes this alternate theory. The plaintiff in that case had taken the position that, in disputes solely between private parties, there is no federal interest warranting application of the government contractor defense. The Supreme Court rejected this position. Justice Scalia, writing for the Court, noted that there are third-party beneficiary situations in which the federal interest is "too remote a possibility" or "far too speculative" to raise the realistic possibility that adjudication of the claim under state law would interfere with federal interests. *Boyle*, 487 U.S. at 506 (quoting *Miree v. DeKalb County*, 433 U.S. 25 (1977)). Notably, the Justice went on to contrast those third-party beneficiary situations, such

as *Boyle*, in which the federal interest justifies the displacement of state law:

> But the same is not true here. The imposition of liability on Government contractors will directly affect the terms of government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.

Boyle, 487 U.S. at 506-07 (distinguishing *Miree*).

Accordingly, the plaintiffs' invocation of a third-party beneficiary theory cannot, standing alone, lift the shield of the government contractor defense. As our colleagues in the Second Circuit emphasized in *Lewis v. Babcock Industries, Inc.*, 985 F.2d 83, 86-87 (2d Cir.), *cert. denied*, 509 U.S. 924 (1993), the *Boyle* paradigm determines whether there is a "significant conflict" between the requirements of the government contract and the duty of care imposed by state tort law. Indeed, the purpose of the first element of the test – government approval of reasonably precise specifications – is to determine whether the requisite conflict with state law exists. *See Boyle*, 487 U.S. at 512 ("The first two [conditions of the three-prong test] assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated."); *Lewis*, 985 F.2d at 85. When the government has approved reasonably precise specifications for a piece of military hardware, state law that would impose liability on the contractor necessarily impedes the federal interest in immunizing contractor compliance with those specifications.

At bottom, the plaintiffs' third-party beneficiary claims are grounded in the assertion that they are entitled to enforce the provisions in the production contract that require the MK-48 to comply with FMCSR 393.83 and to be "complete in all respects." These claims rely in turn on the assertion that the MK-48's exhaust pipe is positioned dangerously close to the right side fuel tank – the same design defect that forms the basis of the design defect claim precluded by *Boyle*. Given our earlier conclusion that, with respect to that design matter, the Marine Corps approved reasonably precise specifications with respect to the exhaust and fuel systems, the third-party beneficiary contract claims urged by the plaintiffs implicate the same discretionary function of the government – and the federal interests identified by the Supreme Court in *Boyle*. Thus, we conclude that summary judgment was appropriate with respect to the plaintiffs' third-party brief theory as well.

D. *Failure-To-Warn Claim*

The plaintiffs submit that, even if Oshkosh has established its entitlement to the government contractor defense with respect to the design of the MK-48, their failure-to-warn claims under Wisconsin law should survive summary judgment. They renew their contention, rejected by the district court, that, in order for the government contractor defense to apply to a failure-to-warn claim, Oshkosh must show that the government either prohibited warnings altogether or dictated the contents of the warnings.

It is well established that the government contractor defense articulated by the Supreme Court in *Boyle* may operate to defeat a state failure-to-warn claim. *See Butler v. Ingalls Shipbuilding, Inc.*, 89 F.3d 582, 586 (9th Cir. 1996); *In re Joint Eastern and Southern Dist. New York Asbestos Litig.*, 897 F.2d 626, 629 (2d Cir. 1990) (collecting cases). The defense applies to failure-to-warn cases because the "significant conflict" identified by the Supreme Court in *Boyle* is equally present when a federal contract and state tort law differ as to the nature and content of required product warnings. *See Tate v. Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995) ("[W]hen the government exercises its discretion and approves warnings intended for users, it has an interest in insulating its contractors from state failure to warn tort liability."). "Just as with conflicting federal and state design requirements, the existence of conflicting federal and state warning requirements can undermine the Government's ability to control military procurement." *In re New York Asbestos Litig.*, 897 F.2d at 629; *see Tate*, 55 F.3d at 1157 (noting that, as in design defect cases, "when the government exercises its discretion and approves warnings intended for users, it has an interest in insulating its contractors from state failure to warn liability").

It is also well established, however, that a defendant may not defeat a state failure-to-warn claim simply by establishing the elements of the government contractor defense with respect to a plaintiff's design defect claim. *See Tate*, 55 F.3d at 1156-57; *In re New York Asbestos Litig.*, 897 F.2d at 632. As our colleagues in the Sixth Circuit have explained,

> design defect and failure to warn claims differ practically as well as theoretically. Simply because the government exercises discretion in approving a design does not mean that the government considered the appropriate warnings that ought to accompany the product.

Tate, 55 F.3d at 1156.

Nevertheless, because similar policy considerations control both design defect and failure-to-warn situations, *Boyle* provides substantial guidance in determining whether state law governing a failure-to-warn claim can be displaced. *See id.* at 1157. In both cases, the discretionary aspect of the federal government's contracting function must define the boundaries of the government contractor defense. *See Boyle*, 487 U.S. at 511-12. In *Boyle*, the Supreme Court established the requirement that the "government approve reasonably precise specifications" as the test of whether a particular case implicates a discretionary function of the government. 487 U.S. at 512. We believe that the same touchstone ought to govern in the context of failure-to-warn claims. As the Sixth Circuit put it, "[w]hen the government exercises its discretion and approves designs prepared by private contractors, it has an interest in insulating its contractors from liability for such design defects. Similarly, when the government approves warnings intended for users, it has an interest in insulating its contractors from state failure to warn tort liability." *Tate*, 55 F.3d at 1157. Thus, when state law would otherwise impose liability for a failure to warn, that law can be displaced when the contractor can show that: (1) the government exercised its discretion and approved certain warnings; (2) the contractor provided

the warnings required by the government; (3) the contractor warned the government about dangers in the equipment's use that were known to the contractor but not to the government.[8] With respect to the first of these factors, the government's approval must, as in the case of product design matters, go beyond merely "rubber stamping" the contractor's choice. If the government chooses its own warnings, the contractor has certainly fulfilled this first condition.

When design defect issues are combined with failure-to-warn issues, litigants often fail to expend the same

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[8] We cannot accept as consistent with *Boyle* the suggestion that there is any strict requirement that the government "prohibit" warnings altogether or "dictate" the contents of the warnings actually incorporated. In support of their position, the plaintiffs invite our attention to the Ninth Circuit's decision in *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 813 (9th Cir. 1992) and to the Second Circuit's decision in *In re Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626, 632 (2d Cir. 1990). The position taken by the Ninth Circuit, however, does not appear to be as rigid as the plaintiffs submit. In the recent case of *Butler v. Ingalls Shipbuilding*, 89 F.3d 582 (9th Cir. 1996), the Ninth Circuit stated that the government contractor defense may apply to a state failure-to-warn claim where the evidence shows that the defendant was "acting in compliance with 'reasonably precise specifications' imposed on it by the United States." *Id.* at 586 (quoting *In re Federal Asbestos Cases*, 960 F.2d at 813 (quoting in turn *Boyle*, 487 U.S. at 512)) (citing *In re New York Asbestos Litig.*, 897 F.2d at 629-32.) Nor are we convinced that the Second Circuit's holding in *In re Joint Eastern & Southern District New York Asbestos Litigation* necessarily states a more stringent standard than the one employed by the Sixth Circuit. *But see Tate*, 55 F.3d at 1157 (suggesting that *In re New York Asbestos Litigation* may state a more demanding standard).

energy litigating the warning issue as they expend on the design defect issue. This case fits that all-too-familiar pattern. Nevertheless, upon examination of the record, we believe that the district court properly granted summary judgment to the defendant. We believe that the undisputed facts of record show that Oshkosh complied with "reasonably precise specifications" imposed on it by the Marine Corps with respect to the warnings on the MK-48 and that the contractor provided those warnings required by the government. In this respect, Oshkosh invites us to the affidavit of Danny J. Lanzdorf, Oshkosh's Chief Engineer for the MK-48. Paragraph 2 of his affidavit provides that "[h]undreds of plans, drawings and specifications were submitted to the U.S. Marine Corps, but the [drawings] attached [to the affidavit] are representative of those reviewed and approved." R.40, Ex.B, at ¶ 2. The drawings attached to the affidavit show several different views of the MK-48 and depict the locations of warnings and component parts such as the exhaust system, mufflers and the fuel tank. With respect to the final element of the government contractor defense, we note our earlier conclusion that Oshkosh did not fail to warn the Marine Corps of any dangers in the use of the MK-48 that were known to Oshkosh but not to the Marine Corps. Under these circumstances, the district court properly entered summary judgment to Oshkosh on the plaintiffs' failure-to-warn claims.

Conclusion

Accordingly, the judgment of the district court i
affirmed.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DONNA SCOTT OLIVER,
as Administratrix of the Estate of
Arthur Dwayne Oliver,

Plaintiff,

v. Case No. 93-C-206

OSHKOSH TRUCK CORPORATION (Filed Jan. 16, 1996)

Defendant.

ERIK B. TATE and
SHIRL D. O'BRIEN-TATE,

Plaintiffs,

v. Case No. 94-C-43

OSHKOSH TRUCK CORPORATION,

Defendant.

APPEARANCES:

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On March 1, 1993, Donna Scott Oliver (Oliver), as administratrix of the estate of Arthur Dwayne Oliver, brought a diversity action against Oshkosh Truck Corporation (Oshkosh), based on an accident involving a truck manufactured by Oshkosh. On January 7, 1994, Erik B. Tate and Shirl D. O'Brien-Tate, husband and wife (collectively referred to as Tate), brought a similar diversity action based on the same accident. Currently before the court are Oshkosh's motions for summary judgment.[1] The

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[1] Also pending are Oliver's and Tate's motions for leave to file a supplemental brief in opposition to the motion for summary judgment and Oshkosh's motions to strike said supplemental briefs or file its own supplemental briefs. The court has considered all of the parties' filings and thus will grant Oliver and Tate leave to file their supplemental briefs and deny Oshkosh's motions to strike. Additionally, as I find the parties' submissions sufficient basis on which to decide the motions for summary judgment, I will deny Oliver's and Tate's requests for oral argument.

Because the motions for summary judgment and the briefs in opposition filed in each case are identical, I will refer,

two cases have been consolidated for purposes of this decision.

I. BACKGROUND

On March 22, 1991, Tate, a corporal in the United States Marine Corps, participated in a convoy carrying supplies on the Khanjar Expressway near the Saudi Arabia-Kuwait border. Tate was a passenger in a MK-48 truck driven by Lance Corporal Oliver. Conditions on the Khanjar Expressway were dusty and visibility was poor, causing the convoy to slow from 20 miles per hour to 5-10 miles per hour. The lead vehicle and the four vehicles behind it stopped. Tate and Oliver were in the fifth vehicle and unfortunately, they were unable to stop before colliding with two other vehicles in the convoy. The fuel tank in Tate and Oliver's vehicle and the fuel tank in one of the other vehicles exploded. Oliver was killed, and Tate received third-degree burns over 60-70% of his body which required amputation of his left leg above the knee.

The crux of Oshkosh's motion for summary judgment does not involve the circumstances of the accident causing Tate's injuries and Oliver's death; rather, it involves the contract between Oshkosh and the Marine Corps for the production of the MK-48. The undisputed facts surrounding the design of the MK-48 are as follows.

The MK-48 is the front half of an articulated 8 x 8 transport truck known as the MK-48-14. The back half, the "14," is a flatbed detachable portion. Both halves of

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hereinafter, to the motions and accompanying briefs in the singular.

the MK-48-14 are powered. The MK-48 has two exposed 75-gallon fuel tanks located on each side of the vehicle. A single exhaust pipe is located on the right side of the vehicle, and is positioned directly above and parallel to the right-side fuel tank. At its closest point, the exhaust pipe is 1.5 inches from the fuel tank.

In the late 1970s, the Marine Corps began development of a modern tactical vehicle fleet, or a "logistics vehicle system" (LVS). Initial efforts were unsuccessful. In 1978, the Marine Corps solicited responses from the heavy automotive and construction equipment industries for commercially available or modified vehicles that would meet the LVS specifications. Twenty-one companies, including Oshkosh, responded. Then, in 1980, the Marine Corps initiated a military procurement process known as a "request for proposal" to find a manufacturer to submit a prototype LVS vehicle meeting specific operational, performance, and container requirements. The Marine Corps accepted Oshkosh's proposal and they executed a contract for purchase.

The purchase contract provided that Oshkosh had "total design responsibility" and that "the submission and approval or disapproval by the government of any changes shall in no way relieve the contractor of this total design responsibility." The contract also set out the specifications for the vehicle, including:

> The vehicle shall have a fuel system conforming to Federal Motor Carrier Safety Regulations (393.65 and 393.76.
>
> . . . .

> The fuel tank(s) shall have adequate capacity for a supply of fuel to enable the vehicle, when towing two 22.5 ton (20.43 metric ton) trailers or one 65 ton (59.01 metric ton) trailer with rated loads, to travel not less than 300 miles (482.7 km) on hard surfaced or secondary roads over rolling terrain. When more than one fuel tank is furnished, means shall be provided to assure equalized fuel level in the tanks.
>
> . . . .
>
> The vehicle shall have an exhaust system conforming to Federal Motor Carrier Safety Regulation 393.83. The exhaust muffler shall be stacked, shall be equipped with a heat shield, and shall have a hinged rain cap. The exhaust system shall have a spark arrester, conforming to the material and performance requirements of MIL-A-27302, except when the vehicle is equipped with a turbocharged engine.

Federal Motor Carrier Safety Regulation 393.83 provides in part:

> Every motor vehicle having a device (other than as part of its cargo) capable of expelling harmful combustion fumes shall have a system to direct the discharge of such fumes. No part shall be located where its location would likely result in burning, charring, or damaging the electrical wiring, the fuel supply, or any combustible part of the motor vehicle.

49 C.F.R. § 393.83(a).

Oshkosh and the Marine Corps engaged in an ongoing dialogue regarding the design of the MK-48, based on tests performed by the Marine Corps on Oshkosh's prototype. Hundreds of changes were made to the prototype

design during this time. Part of this dialogue concerned the configuration of the exhaust system and the fuel tanks. Oshkosh's placement of the fuel tanks and the exhaust system was to conform to the Marine Corps' width requirement for the MK-48. The Marine Corps did not request any changes in Oshkosh's proposed location of the fuel tanks and the exhaust system. Before final production, however, the Marine Corps asked Oshkosh to include "Explosafe" and, later, "Scott Foam," both explosion suppressants, in the fuel tanks to inhibit explosivity. Oshkosh included these materials in its design of the MK-48 and, on the Marine Corps' request, offered its opinion that an explosion suppressant would degrade the fuel supply and cause some damage to the engine. The Marine Corps then specified that an explosion suppressant not be used in the MK-48.

In 1983, after Oshkosh's design for the MK-48 had been modified enough to pass the Marine Corps' testing, the Marine Corps awarded Oshkosh the production contract. The final production contract included extensive specifications and dimension requirements for the MK-48, including specifications for the fuel tanks and the exhaust system. Oshkosh directs the court's attention to the following provisions in the production contract:

> 1.3 Special Attention Items. The following items as specified in detail in other sections of this contract are hereby highlighted. The vehicle systems listed herein *must* be capable of achieving the following:
>
> 1.3.1 The MK 48/16 must be capable of loading and towing a combat loaded M60A1 MB Tank

(57 tons) on a M747 Semi-Trailer on improved and unimproved roads.

1.3.2 The MK 48/14 must be capable of transporting a 22.5 ton payload on improved roads and towing an additional 22.5 ton payload on an M871 semi-trailer with dolly convertor, and a 12.5 ton payload on a MK 14 with towing system kit.

1.3.3 All units (MK 48, MK 14, MK 15, MK 16, MK 17) must fit in an 8 x 8 x 20 foot ANSI/ISO Flatrack Container.

1.3.4 All vehicles must be transportable by C130E, C130R, C141B and C5A aircraft.

1.3.5 All units must be capable of being externally transported by CH-53E Helicopter.

. . . .

3.1 Basic Vehicle System and/or Components, Parts and Accessories. The basic power/powered trucks or vehicle system of the type described in this specification, hereinafter referred to as "the vehicle", shall be comprised of components, parts and accessories which are standard commercial and which meet or exceed the requirements of this specification. The vehicle shall be complete in all respects, as would normally be delivered to the commercial heavy truck transport and construction equipment industry. The vehicle shall also be preserved, packaged and packed in accordance with the best commercial practice acceptable to the Government and common carrier. The vehicle and all of its components shall have currently published rated capacities consistent with on/off road usage as indicated in para. 1.2 above. All power train components shall be certified by the

contractor as being compatible with and properly matched with all related or affected components assembled to meet the specifications stated herein. Maximum commonality of components must be used throughout the vehicle, in addition to the requirement for commonality of components between vehicle, in addition to the requirement for commonality of components between vehicle models. All powered rear body units (MK 14, MK 15, MK 16 and MK 17) differences shall be limited to different length and strength of main frame structural members; addition or deletion of mounted body and equipment interface items; drive shaft lengths and components.

. . . .

3.1.2.10 Dimensions. Dimensions in the unloaded condition shall be as follows:

a. Overall operating height – shall not exceed 102 inches on all system types. The crane height shall not exceed 95 inches when in stowed position. . . .

b. All unit types (MK 48, 14, 15, 16, or 17) shall be capable of being loaded in a flatrack container on a commercial ship. The nominal dimensions of the flatrack is [sic] as listed:

(1) Length – 20 feet

(2) Width – 8 feet

(3) Height – 8 feet

. . . .

d. Angle of approach and departure shall not be less than 45 degrees, loaded or unloaded, except than [sic] the angle of departure for MK

48/17 shall be not less than 40 degrees. The minimum ground clearance shall be not less than 13 inches.

. . . .

3.1.3 Performance. Requirements shall be met with vehicle systems loaded to specified GVW and GCW per para. 3.1.2.5. Minimum gradeability and speed requirements are as follows:

3.1.3.1 Speed and Gradeability.

a. Vehicles MK 48/14, MK 48/17 with towed full trailer and MK 48/15 with semitrailer shall start on and climb a 10 percent grade and GCW (per 3.1.2.5) (adequate traction assumed). If a torque converter is provided, the system must start and after initial acceleration, climb the grades specified while maintaining the converter efficiency factor established by the manufacturer for continuous duty. System shall have gearing and torque capable of meeting the minimum gradeability requirements. . . .

b. Vehicles MK 48/14, MK 48/15 and MK 48/17 without towed load shall be further capable of starting on and climb (in forward direction) a 60 percent grade at a GVW of 64,000 lb, adequate traction assumed. This shall be a performance rather than durability requirement. Vehicle shall have gearing and torque capable of meeting the minimum gradeability requirements. . . .

. . . .

3.1.3.3 Slope Operation. All vehicle types with off road GVW without towed load shall be capable of operation headed up and headed down slope on longitudinal grades as specified in

para. 3.1.3.1 and side slopes up to 30 percent with each side of the vehicle up slope. As a result of the operation, no evidence of faulty lubrication, leakage or other malfunction shall be found.

. . . .

3.1.3.5 [sic] Fording. The vehicle, without prior preparation, (no kits) shall ford hard-bottom water crossings, fresh or salt water, to a depth of 60 inches for no less than 5 minutes duration without damage or additional maintenance prior to further operation, and less than one (1) percent contamination of lubricants in those enclosures which are designed to exclude contaminants. The engine must be capable of restart during fording.

. . . .

3.1.3.9 System Reliability.

Each LVS type shall meet a system reliability requirement of no less than 600 Mean-Miles-Between-System-Failures (MMBSF), or 966 MKBSF. This includes primary major defects of any vehicle item which requires repair or replacement as a result of usage during the test period. In addition, crane assemblies shall meet a system reliability of 200 hours Mean-Time-Between-System-Failures (MTBSF) exclusive of vehicle requirements. This requirement is exclusive of the specified material handling equipment and winches.

. . . .

3.1.3.11 Durability

Each LVS type shall be capable of completing 20,000 continuous miles (32,186 km) of operation within or no greater than the severity of the specified mission profile, without degradation of the items listed in para. 3.1.3.11 requiring replacement regardless of maintenance level, or repair at a maintenance level greater than third echelon.

a. For the following major assemblies and systems:

a. Engine

b. Transmission

c. Transfer Case

d. Axle Assembly

f. [sic] Articulation System

g. [sic] Hydraulic System

At least four of the six test vehicles must each complete 20,000 continuous miles of test and not incur a single durability failure of any of the major assemblies/subsystems listed above.

b. All six test vehicles must each complete 20,000 continuous miles of test and not incur, in either vehicle module, a single durability failure of the frame. A frame/welded cross member interface separation, or a crack, or significant deformation of the frame or integral welded cross-member during test is considered a durability failure.

3.1.3.12 Maintainability

. . . . Each type LVS shall be designed so that each of the following can be removed from the vehicle and replaced in under four hours by a four-man team of trained mechanics:

a. Engine (only)

b. Transmission (only)

c. Engine-Transmission Assembly

d. Transfer Case

e. Axles

f. Suspension Spring Assembly

The four-hour criteria includes all preparation; i.e., hood removal, draining fluid, etc. Routine daily maintenance checks, i.e., engine oil, coolant level, lights and brakes, etc., must be readily accomplished without the use of tools. Pre-operation fluid level checks shall not take longer than five minutes. Components of the vehicle shall be readily accessible for servicing, repair, and replacement. Ease of maintenance provisions shall incorporate features insuring operating clearances, and facilitating maintenance and service operations.

. . . .

3.2.8 Fuel System. Fuel system shall conform to Federal Motor Carrier Safety Regulations 393.65 and 393.67.

3.2.8.1 Fuel Tanks. All Front Power Units shall be equipped with two 75 gallon corrosion resistant fuel tanks adequate to provide a minimum 300 mile operating range based on the max payload traveling over a mix of terrains as specified

> in Table II. A means shall be provided to assure equalized fuel level and draw in both tanks. A manual shut-off valve shall be furnished. Fuel tanks will be provided with minimum 3-inch diameter safety type tank filler cap or caps, which can be grasped and removed/installed with arctic mittens. Filler caps shall be located to preclude mud buildup and captive chained to filler neck. Removable strainers are required. A sealed filler cap and vent are required for fording requirements.
>
> . . . .
>
> 3.2.9 Exhaust System. The exhaust system shall conform to Federal Motor Carrier Safety Regulations [sic] 393.83. The exhaust system as installed shall be gas tight and leak proof to prevent the accumulation of exhaust gas in the occupied areas in accordance with best commer[ci]al practice. The tail pipe(s) shall be configured to prevent entry of rain water when vehicle is not operating. Exhaust mufflers and tail pipes shall be corrosion resistant and shall be furnished with adequate guards to prevent personnel contact while operating winches and other equipment mounted, or intended to be mounted, entering or exiting the cab, and normal entry and exit of rear deck. The exhaust system shall be positioned to allow fording of 60" of water without kits.

Defendant's Brief in Support of Summary Judgment Motion, Ex. E-1.

The MK-48 fuel tanks were provided to Oshkosh by Cutler Metal Products Company (Cutler). On October 6, 1983, Cutler certified that the fuel tanks and liquid fuel system met Federal Motor Carrier Safety Regulations

393.67 and 393.65. Later, Oshkosh also certified that the fuel tanks and liquid fuel system conformed to the applicable Federal Motor Carrier Safety Regulations. The exhaust system was not similarly certified, and the parties dispute whether the exhaust system met the requirements of Federal Motor Carrier Safety Regulation 393.83.

Under the production contract, Oshkosh was required to obtain the consent of the Marine Corps before making any improvements to the MK-48. Oshkosh submitted a Safety Assessment Report, as required by the production contract, which stated in part, "Fuel is very flammable and can explode easily" and "Fuel can be ignited by a hot engine."

Finally, the production contract required a Marine Corps representative to inspect each completed vehicle. If the representative determined that a particular vehicle did not comply with the contract specifications, the vehicle would be returned to Oshkosh for corrections. The Marine Corps purchased about 1,600 vehicles in 1988.

In their complaints, Oliver and Tate set out the following bases for liability:

> The MK48, as designed, manufactured and delivered by [Oshkosh], was defective and unreasonably dangerous in at least the following respects:
>
> > (a) The fuel tanks were located outside of the frame rails of the vehicle, making the tanks vulnerable to spillage and resulting fires in low-speed collisions;

(b) The materials used in manufacturing the fuel tanks were insufficiently strong to withstand foreseeable collisions;

(c) The fuel tanks failed to conform to specifications contained in the contract with the United States government;

(d) The MK48 was unreasonably dangerous to its users;

(e) The MK48 was not merchantable and not reasonably suited to the use intended;

(f) The MK48 was not accompanied by adequate warnings of the danger to users so as to permit those users to take precautions for their own safety.

[Oshkosh] knew or should have known of the danger presented by the fuel tanks of the MK48, yet failed to warn either the United States government or other prospective users of the dangers inherent in the vehicle. Because of its knowledge of the danger presented by the fuel tanks of the MK48, [Oshkosh]'s failure to remedy the dangerous condition or to warn users of the danger amounted to a willful and conscious disregard of the rights of others.

Complaint (Oliver) at ¶¶ 27-29; Complaint (Tate) at ¶¶ 26-28.

II. DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In deciding a motion for summary judgment, the court must view the facts in the light most favorable to the nonmoving party. *E.g., Fisher v. Transco Servs. Milwaukee, Inc.*, 979 F.2d 1239, 1242 (7th Cir. 1992). With respect to the nonmoving party's burden, the Federal Rules of Civil Procedure provide that

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

Oshkosh argues that it is entitled to summary judgment based on the government contractor defense established by *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). In *Boyle*, the Supreme Court set out a three-part test to determine if the government contractor defense applies:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were

known to the supplier but not to the United States.

Boyle, 487 U.S. at 512. The defendant bears the burden of proving each element of the defense. *Carley v. Wheeled Coach*, 991 F.2d 1117, 1125 (3d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 191 (1993). In the context of a motion for summary judgment, the defendant must show that there is no genuine issue of material fact as to each element of the defense. *Carley*, 991 F.2d at 1125. Oshkosh argues that these three factors are satisfied by the undisputed facts of this case; Oliver and Tate, predictably, argue that they are not.

A. Approval of Reasonably Precise Specifications

The first prong of the *Boyle* test, whether the government approved reasonably precise specifications, actually involves three inquiries with regard to the facts presented here. First, I must determine whether the government has delegated, and to what extent, discretion over the product design to the contractor. Along that line, I also must ask whether the government's approval, if any, was meaningful or merely a formality. And thirdly, I must determine whether the specifications were reasonably precise.

The exercise of government discretion, relevant to the first two inquiries under the first element of the government contractor defense, is at the heart of the defense. The *Boyle* Court premised application of the government contractor defense on a "significant conflict" between state law and an area of uniquely federal concern, such as military procurement. *Boyle*, 487 U.S. at 507. To illustrate

the parameters of such a conflict, the Court set out three scenarios. First, there is no significant conflict where the government merely orders a piece of equipment from a manufacturer's stock, because the government would not have a significant or unique interest in the design features of that piece of equipment.[2] *Boyle*, 487 at 509. On the other end, and as was the case in *Boyle*, if the duty imposed by the government contract is contrary to the duty imposed by state law, a significant conflict exists. Thus, where the government contract specifies a particular design feature that the plaintiff later argues violates the duty of care imposed by state law, the government contractor defense should apply to protect the uniquely federal interest. *Id.* Between these two scenarios is the situation where,

> for example, the United States contracts for the purchase and installation of an air-conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature

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[2] Apparently, Oliver and Tate are driving at this point by repeatedly suggesting that the MK-48 was a commercial vehicle. Although Oshkosh's proposal to the Marine Corps was based on what was referred to as a commercially available vehicle, it is abundantly clear from the record that the Marine Corps did not merely order a piece of equipment from Oshkosh's stock. Unlike the insulation in *In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992), the only case cited by Oliver and Tate on this point, the MK-48 plainly was "developed on the basis of involved judgments made by the military [and not] in response to the broader needs and desires of end-users in the private sector." *Id.* at 811. Thus, this argument does not merit further analysis.

> would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context.

Id. Thus, where a government contract specifies a particular *operational* characteristic but does not mandate "the precise manner of *construction*," a significant conflict does not necessarily exist, because the government specifications may not preclude the inclusion of the safety feature.

The situation presented in this case falls into the middle ground identified by the *Boyle* court. The Marine Corps expressly delegated "total design responsibility" to Oshkosh, yet mandated several performance specifications. Presumably, then, the question is whether those performance specifications effectively mandated "the precise manner of construction" by limiting alternative designs. If the performance specifications were such that Oshkosh could *not* "comply with both its contractual obligations and the state-prescribed duty of care," then a significant conflict exists.[3]

With regard to the first inquiry, Oliver and Tate rely on *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), in which the Fifth Circuit distinguished exercise and delegation of design responsibility:

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[3] This essentially is Oshkosh's argument.

> The government exercises its discretion over the design when it actually chooses a design feature. The government delegates the design discretion when it buys a product designed by a private manufacturer; when it contracts for the design of a product or a feature of a product, leaving the critical design decisions to the private contractor; or when it contracts out the design of a concept generated by the government, requiring only that the final design satisfy minimal or general standards established by the government.

Trevino, 865 F.2d at 1480. Thus, Oliver and Tate argue, because the purchase contract provided that Oshkosh had "total design responsibility," the Marine Corps did not exercise any discretion with regard to the design of the MK-48. The undisputed facts and applicable case law undercut this argument. Although Oshkosh certainly had an active role in designing the MK-48, the Marine Corps' input, through contract specifications and testing, was extensive. Most importantly, the undisputed facts show that the Marine Corps approved Oshkosh's design. Government approval, rather than government design, is the key to the government contractor defense.

Despite *Trevino*'s broad language, the *Boyle* Court did not intend that active participation of the contractor in the design process would preclude application of the government contractor defense:

> The first two [elements of the government contractor defense] assure that the suit is within the area where the policy of the "discretionary function" would be frustrated – *i.e.*, they assure that *the design feature in question was considered by a*

> *Government officer, and not merely by the contractor itself.*

Boyle, 487 U.S. at 512 (emphasis added); *see also Carley*, 991 F.2d at 1125 ("[T]he government need not deprive the manufacturer of all discretion pertaining to a particular design feature in order for the government contractor defense to apply."). The Court's intent in this regard also is buttressed by its reliance on the "discretionary function" exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a), as a guideline for application of the government contractor defense. Section 2680(a) excepts from the Act's consent to suit "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." The Court stated,

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption.

Boyle, 487 U.S. at 511 (citation omitted). "Thus, where the government exercises its discretion with regard to the

design of a particular piece of equipment (instead of simply ordering it from stock), discretion expressed through 'engineering analysis' and the exercise of judgment regarding technical and military factors, and trade-offs between safety and mission effectiveness, and where the three *Boyle* elements are satisfied, a military contractor is entitled to immunity from suit under state tort law." *In re Aircraft Crash Litigation Frederick, Maryland*, 752 F. Supp. 1326 (S.D. Ohio 1990), *aff'd, Darling v. Boeing Co.*, 935 F.2d 269 (6th Cir. 1991) (citation omitted).

Several lower court decisions emphasize the government's role in approving a contractor's design. In *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985), a soldier was killed when the front end loader he was operating overturned and crushed him. His widow sued the manufacturer, which raised the government contractor defense. In determining whether the government approved reasonably precise specifications, the court stated:

> In this case, the evidence submitted to the district court demonstrated that the Government provided defendant with specifications for various component parts of the front end loader. The Government's specifications did not include the presence of roll-over protection on the front end loader. The Government specified that defendant should produce the loader in conformance with defendant's own commercial specifications in any areas in which the Government's specifications were silent. The Government further required defendant to produce a prototype of the front end loader, and to submit this prototype to Government inspection and approval before manufacture of the final product. The evidence indicated that defendant

> submitted to the Government for approval a prototype of the front end loader which did not include roll-over protection. The evidence also indicated that the Government approved defendant's prototype. Under these circumstances, this court finds that the Government established reasonably precise specifications for the front end loader and approved any supplementary specifications tendered by defendant in the form of a prototype loader.

Tillett, 756 F.2d at 599 (applying the government contractor defense standard endorsed by the *Boyle* court).

In *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990), the widow of an Air Force pilot who died when his F-16 crashed sued the manufacturer of the plane.[4] In determining whether the first element of the government contractor defense was satisfied, the court considered the "continuous back and forth" between the government and the contractor in the design of the F-16:

> The Air Force initiated the F-16 project in the early 1970's by issuing a Request for Proposal seeking a contractor to develop the first "fly-by-wire" or all-electric fighter aircraft. General Dynamics responded with proposed Air Vehicle Specifications, that were evaluated by the Air

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[4] The jury had returned a verdict in favor of the plaintiff, and the district court denied the defendant's motion for judgment notwithstanding the verdict. The defendant's motion was based on a version of the government contractor defense rejected in *Boyle*. The court of appeals reviewed the district court's decision in light of *Boyle*, which had been decided in the interim, and reversed. *Harduvel*, 878 F.2d at 1315.

> Force Systems Program Office. The Office conducted an extensive review of the aircraft, including the electrical system, examining specifications, drawings, and blueprints. One group of Air Force engineers was specifically assigned to review of the electrical system. The Air Force conducted independent review and analysis of the electrical system design and evaluated designs in a Preliminary Design Review, Critical Design Review, and later Physical Configuration Audit that took place between 1973 and 1975 prior to the start of production. Government review and approval of design and production methods continued after production began. Indeed, the Air Force requested an increase in wiring capacity on the particular block of F-16's from which *Harduvel*'s came. The [government contractor] defense requires "only that the government approve reasonably precise specifications," and is met where, as here, the contractor incorporated government performance specifications into a design that the government subsequently reviewed and approved.

Harduvel, 878 F.2d at 1320. The *Harduvel* court specifically distinguished the procurement and design process in *Trevino*. *Id*. The *Trevino* court described the process in that case as follows:

> In 1966 and 1967 the Navy contracted with General Dynamics Corporation Electric Boat Division to do the design work on the diving hangar. The contracts required General Dynamics to produce working drawings of the hangar and the lock-in/lock-out system and to assume full responsibility for all necessary technical research, to review its work product to assure compliance with the [Navy's circular of

> requirements describing the design of the diving hangar], and to conduct all quality assurance, including inspection of the end product, before issue to the Navy. General Dynamics supplied thirty-seven employees, who worked on-site at [the Mare Island Naval Shipyard] and produced 71 pages of detailed working drawings. Each of the drawings was signed by a government employee in a box marked "approved." After General Dynamics completed the drawings, their employees left [the shipyard], and the Navy performed all the manufacturing and conversion work on the [submarine].
>
> . . . The Navy never performed nor required a formal design/safety review of the [submarine's] diving system prior to the accident.

Trevino, 865 F.2d at 1476-77. It was in reference to this process that the *Trevino* court addressed the meaning of government approval under *Boyle*: "When the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion. A rubber stamp is not a discretionary function; therefore, a rubber stamp is not 'approval' under *Boyle*." *Trevino*, 865 F.2d at 1480.

In *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698 (4th Cir. 1989), *cert. denied*, 495 U.S. 953 (1990), a Navy pilot was killed when his aircraft overturned during landing. His widow sued the manufacturer, alleging that the landing gear was negligently and defectively designed. The court held that the plaintiff's claim was precluded by the government contractor defense, finding

the degree of the government's participation in the development of the aircraft pertinent:

> Plaintiffs' claim is precisely the sort for which the [government contractor] defense was intended. This is true both because of the nature of defendant's product and the characteristics of the process by which it was designed. At issue here is a discretionary decision involving military hardware in which the government was a substantial participant. . . . it is hard to imagine a matter more uniquely in the province of the military – and one less appropriate to second-guessing by civilian courts – than the development of a high-technology, multi-mission aircraft.
>
> Similarly, the design details of the F/A-18 illustrate the balancing of military and technological factors, including "the trade-off between greater safety and greater combat effectiveness." [*Boyle*, 487 U.S. at 511.] For example, the main landing gear at issue here had to absorb extremely high amounts of energy generated upon landing on a carrier. On the other hand, stowage of the gears could not interfere with external weapon storage. . . .
>
> The design and production of the F/A-18 also illustrate the exchange of views in the procurement process between military officials and the private contractor. *See Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir. 1989); *Tozer v. LTV Corp.*, 792 F.2d 403, 407 (4th Cir. 1986) [, *cert. denied*, 487 U.S. 1233 (1988)]. Beginning with bids for what would become the F/A-18, teams of Navy engineers met with each contractor for extended discussions of their submissions. When the Navy selected MDC to

> develop and build the F/A-18, the final design contracts for the aircraft incorporated MDC's original proposal as modified during extensive negotiations between the parties. During design development, MDC was required to submit detailed engineering drawings to the Navy for approval. All changes to the design or specifications of the aircraft required Navy approval, including proposals to address problems with the allegedly defective landing gear. The government also maintained an extensive staff of aircraft engineers on site at MDC's facilities in St. Louis.
>
> It is this salient fact of governmental participation in the various stages of the aircraft's development that establishes the military contractor defense. Indeed, active governmental oversight is relevant to all three elements of defendant's burden. Where, as here, the Navy was intimately involved at the various stages of the design and development process, the required governmental approval of the alleged design defect is more likely to be made out.

Kleemann, 890 F.2d at 700-01.

In re Aircraft Crash Litigation Frederick, Maryland arose out of the crash of an Air Force EC-135N aircraft. The court, in determining whether the first factor of the government contractor defense was met, followed essentially the same analysis of the applicable cases as set out above and then stated:

> Plaintiffs have repeatedly sought to structure the Court's inquiry under *Boyle* so as to require the Court simply to determine who, as between the Defendant contractors and the Air

Force, "designed" the KC/C-135, its autopilot and the A/RIA modifications. . . . Plaintiffs assert, specifically, that Boeing (and not the Air Force) "prepared" the Detail Specification for the KC-135 series aircraft, and that Boeing "prepared" the specifications for the autopilot, which specifications were incorporated into the contract between Lear and the Air Force. Plaintiffs also quote the testimony of Mr. Wilson Hale that "Lear had to *design* the detailed components of the autopilot." Plaintiffs further assert that MDC (and not the Air Force) "designed" the A/RIA modifications, and "MDC's design concept" was incorporated into its contract with the Air Force.

Plaintiffs misconstrue the focus of this Court's inquiry under *Boyle*. The principal issue for this Court is not who "designed" the particular features of the EC-135N which Plaintiffs assert were defective, but whether the Air Force approved specifications for those features which were reasonably precise. Therefore, the argument that a Defendant's "design" or "design concept" became a part of its contract with the Air Force, supports, rather than vitiates, the *Boyle* defense. It is necessary under *Boyle* merely that a contractor incorporate the government's performance specifications into "a design that the government subsequently review[s] and approve[s]." *Harduvel*, 878 F.2d at 1320. If this occurs in the context of a design process marked by continuous interchange between the contractor and the government (and subject to government final approval of the design), the fact that the particular "design concept" at issue was the contractor's does not of itself defeat the defense.

In re Aircraft Crash Litigation, 752 F.Supp. 1341-42 (footnote and citations to the record omitted).

Here, the purchase contract provided that Oshkosh had "total design responsibility," and that "the submission and approval or disapproval by the government of any changes shall in no way relieve the contractor of this total design responsibility." According to the officer responsible for administering the contract, the Marine Corps intended the "total design responsibility" provision to ensure that Oshkosh, rather than the government, would be responsible for the design of the MK-48. On the other hand, the Marine Corps evaluated Oshkosh's proposal before entering into the purchase contract, conducted tests on the prototype prepared by Oshkosh, and engaged in an on-going dialogue with Oshkosh which resulted in hundreds of changes to the design of the prototype. Part of this dialogue concerned the exhaust system and the fuel tanks, although the Marine Corps did not request any changes in Oshkosh's proposed location of the fuel tanks and the exhaust system. It is undisputed that Oshkosh's placement of the exhaust system and the fuel tanks was designed to conform to the Marine Corps' width requirement for the MK-48. Before final production, the Marine Corps asked Oshkosh to include an explosion suppressant in the fuel tanks. Oshkosh included an explosion suppressant in its design of the MK-48 and, on the Marine Corps' request, offered its opinion that an explosion suppressant would degrade the fuel supply and cause some damage to the engine. The Marine Corps then specified that an explosion suppressant not be used in the MK-48. After two and a half years of extensive testing and hundreds of changes to

Oshkosh's design, the prototype passed testing and the Marine Corps awarded Oshkosh the production contract. The final production contract contained extensive and exacting performance specifications and dimension requirements. The production contract also required Oshkosh to obtain the consent of the Marine Corps before making any improvements to the MK-48 and to submit a Safety Assessment Report. Finally, the Marine Corps inspected the final production of vehicles before accepting them for military use.

The design process here is, in all pertinent aspects, identical to the processes in *Tillett*, *Harduvel*, *Kleemann*, and *In re Aircrash Litigation*. As in *Tillett*, Oshkosh was required to submit a prototype for inspection, testing, and approval by the Marine Corps. After making hundreds of changes, the Marine Corps approved the prototype. The *Tillett* court determined that the contractor's submission of the prototype and the government's subsequent inspection and approval was sufficient evidence to show that the government "established reasonably precise specifications for the front end loader and approved any supplementary specifications tendered by [the contractor] in the form of a prototype loader." *Tillett*, 756 F.2d at 599. As in *Harduvel*, *Kleemann*, and *In re Aircrash Litigation*, the Marine Corps engaged in a continuous exchange with Oshkosh regarding the design and performance specifications of the MK-48. The design of Oshkosh's prototype was determined by the precise performance specifications mandated by the Marine Corps. Based on the extensive testing conducted by the Marine Corps, the Marine Corps directed Oshkosh to make hundreds of changes until the prototype passed the Marine Corps'

tests. The Marine Corps reviewed and approved each change to the design of the MK-48. As the *Harduvel* court held, "The [government contractor] defense requires 'only that the government approve reasonably precise specifications,' and is met where, as here, the contractor incorporated government performance specifications into a design that the government subsequently reviewed and approved." *Harduvel*, 878 F.2d at 1320.

Thus, the undisputed facts indicate that although the Marine Corps expressly delegated "total design responsibility" to Oshkosh, Oshkosh's design of the MK-48, including the placement of the fuel tanks and the exhaust system, incorporated the Marine Corps' performance specifications. The Marine Corps subsequently reviewed, tested, and approved Oshkosh's design. This approval was not merely a rubber stamp, as evidenced by the Marine Corps' extensive testing, ongoing dialogue with Oshkosh regarding the design of the MK-48, and veto of the inclusion of the explosion suppressant foam as a safety measure. The specifications, both the performance specifications mandated by the contract and the design specifications submitted by Oshkosh and approved by the Marine Corps, were undisputably reasonably precise. Most certainly, to paraphrase the *In re Aircraft Crash Litigation* court, the undisputed facts establish that Oshkosh incorporated the Marine Corps' performance specifications into a design that the Marine Corps subsequently reviewed and approved. This occurred in the context of a design process marked by continuous interchange between Oshkosh and the Marine Corps (and which was subject to Marine Corps' final approval of the design). Thus, the fact that the particular "design concept" at

issue was Oshkosh's does not of itself defeat the defense. I conclude, therefore, that although the Marine Corps expressly delegated "total design responsibility" to Oshkosh, the Marine Corps' participation in the design process and approval of the final design were both extensive and authoritative, and not merely rubber stamps. Further, the specifications approved by the Marine Corps were reasonably precise. Thus, Oshkosh has established the first element of the government contractor defense.

B. Equipment Conformity

To establish the second element of the government contractor defense, Oshkosh must show that the MK-48 conformed to the specifications approved by the Marine Corps. Oliver and Tate argue that the MK-48 failed to conform to two of the contractual specifications: that the vehicles comply with Federal Motor Carrier Safety Regulation 393.83 and that the vehicles be "complete in all respects." Specifically, Oliver and Tate argue that the placement of the exhaust pipe on top of the right fuel tank likely will result in burning the fuel supply or fuel vapors, in violation of Federal Motor Carrier Safety Regulation 393.83, and that the MK-48 was not "complete in all respects" because it was not crash worthy. Oshkosh contends that the Marine Corps approved the configuration of the fuel tanks and the exhaust system, and that it did not deviate from the Marine Corps' specifications because the location of the fuel tanks and the exhaust system was dictated by the width requirement for the MK-48. Two considerations are important here: whether the alleged defect is one of design or manufacture, and whether the relevant specifications are reasonably precise.

Although Oliver and Tate use the term "manufacture" in their briefs, they do not contend that the alleged defect in the MK-48 was one of manufacture. Rather, it is clear that the basis for Oliver's and Tate's actions is an alleged defect in the design of the exhaust system. In *Harduvel*, the court distinguished between design and manufacturing defects:

> In determining whether a claimed defect is one of "design" for purposes of the government contractor defense, the proper focus is the protection of discretionary government functions for which the defense is intended. If a defect is one inherent in the product or system that the government has approved, it will be covered by the defense. Where a defect is merely an instance of shoddy workmanship, it implicates no federal interest. This distinction between "aberrational" defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. Stated another way, the distinction is between an unintended configuration, and an intended configuration that may produce unintended and unwanted results.

Harduvel, 878 F.2d at 1317 (citation omitted). The court went on to hold that the second prong of the government contractor defense was satisfied based on this analysis:

> To say that a product failed to conform to specifications is just another way of saying that it was defectively manufactured. . . . Plaintiff did present substantial evidence that the design – not the manufacture – of the F-16 wiring system was susceptible to dangerous wire chafing, but

> that claim is subject to the *Boyle* defense. The second condition for application of the defense is present here as a matter of law.

Harduvel, 878 F.2d at 1321. Thus, because Oliver and Tate argue that the *design* of the MK-48 did not comply with Federal Motor Carrier Safety Regulation 393.83 and the contract provision that the vehicles be "complete in all respects," their footing is more tenuous than if they had alleged a manufacturing defect. I already have determined that the Marine Corps approved reasonably precise specifications for the design of the MK-48, including the design of the exhaust system. As a matter of logic, then, it becomes difficult to argue that the design did not conform to the specifications by which the design was developed. As the *Kleemann* court stated,

> It is this salient fact of governmental participation in the various stages of the aircraft's development that establishes the military contractor defense. Indeed, active governmental oversight is relevant to all three elements of defendant's burden. Where, as here, the Navy was intimately involved at the various stages of the design and development process, the required governmental approval of the alleged design defect is more likely to be made out. *See Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946, 950-51 (4th Cir. 1989); *Dowd v. Textron, Inc.*, 792 F.2d 409, 412 (4th Cir. 1986) [, *cert. denied*, 487 U.S. 1233 (1988)]. Similarly, the Navy's extensive participation, including reservation of the power to approve or disapprove design modifications, enhances the likelihood of final product conformity.

Kleemann, 890 F.2d at 701.

Further, the specifications on which Oliver and Tate rely are not reasonably precise. In *Kleemann*, the plaintiffs argued that the F/A-18's landing gear failed to conform to the Navy's specifications that the landing gear be strong enough to withstand normal landing loads without bending. The court first recounted the Navy's extensive role in the development of the F/A-18's design, including the design of the landing gear and then concluded,

> Plaintiffs' reference to the general failure of F/A-18 landing gear to withstand normal landing loads without bending or unlocking fails to take into account this significant history. Requirements such as an ability to withstand normal loads and prohibitions against operational failures represent little more than the hopes of participants that the project on which they are about to embark will turn out well. General qualitative specifications must be distinguished from the "detailed, precise and typically quantitative specifications for manufacture of a particular military product." *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 745 (11th Cir. 1985) [, *cert. denied*, 487 U.S. 1233 (1988)]. These two broad types of specifications often overlap and may even be at cross purposes – for example, design specifications for a complex back-up system may conflict with the qualitative requirements of ease of maintenance, combat effectiveness or cost containment. Only the detailed, quantitative specifications – and not those calling for such vagaries as a failsafe, simple or inexpensive product – are relevant to the government contractor defense.

> In essence, plaintiffs' argument is that the ultimate design of the landing gear failed to produce an aircraft that performed perfectly. Plaintiffs' view would render the government contractor defense illusory. Nonconformance to precise specifications must mean more that the design does not work in compliance with some "general admonition against an unwanted condition." *Harduvel*, 878 F.2d at 1319 n.3. A product involved in a design-induced accident would, as a definitional matter, always would be deemed not to comply with such generalities since no performance specifications approved by the government would purposely allow a design that would result in an accident. In fact, plaintiffs describe exactly the situation in which the government contractor defense *does* apply: when the required ultimate military design fails to produce a "reasonably safe" product under state law. Contrary to plaintiffs' assertions, a product conforms to reasonably precise specifications if it satisfies "an intended configuration" even if it "may produce unintended and unwanted results." *Id.* at 1317. The evidence demonstrates that the alleged defect inhered in the unique design of the landing gear itself – as required by the Navy – and did not result from any deviation from the required military specifications.

Kleemann, 890 F.2d at 703 (some citations omitted).

The only case on which Oliver and Tate rely with regard to this issue is easily distinguishable from the facts at hand. In *Gray v. Lockheed Aeronautical Sys. Co.*, 880 F. Supp. 1559 (N.D. Ga. 1995), a Navy S-3 aircraft crashed after the pilot was unable to correct a slow right roll. The

crash was caused by the malfunction of the servo, the portion of the aircraft which provides lateral control. The court found, essentially, that the servo did not switch to manual mode when it should have and that this failure was caused in part by mis-sized pins and latches in the servo. The court accordingly determined that the servo did not conform to the Navy's specification requiring "an automatic manual reversion system that operated without a hazardous lag" because the servo did not engage automatically and suffered a lag of four to five times that intended by the defendant's design. 880 F. Supp. at 1567. The facts of *Gray* are plainly different from those presented here. Oliver and Tate point only to contract provisions requiring that no part of the exhaust system be located where it is likely to ignite the fuel and that the vehicles be "complete in all respects." These, unlike the specification in Gray that the servo have an automatic manual reversion system that operates without a hazardous lag, are not reasonably precise specifications. Instead, they simply are "general admonitions" that the MK-48 be crash worthy.

Oliver and Tate also cite *Landgraf v. McDonnell Douglas Helicopter Co.*, 993 F.2d 558 (6th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 553 (1993). In that case, the plaintiff argued that the helicopter manufactured by the defendant for the Army did not meet the Army's specification that the rotor-tail boom clearance be nine to twelve inches because the clearance was in fact only three inches. The court determined that the specification in question was "a desirable goal and a recommended way of achieving it, but not precise specifications." *Id.* at 564. Importantly, the court noted that the Army was aware of the three-inch

clearance, yet did not order additional testing or design changes: "We do not believe the Army treated the [specification] as formulating mandatory requirements. By permitting production to continue without any change in design following the 1969 tests, the Army made a discretionary decision to not insist on the clearance recommended in [the specification]." *Id.* The *Landgraf* court also expressly approved the *Kleemann* and *Harduvel* courts' application of the government contractor defense. *Id.*

I conclude that the situation presented in this case more closely resembles those addressed by the courts in *Harduvel, Kleemann,* and *Landgraf.* The provisions on which Oliver and Tate rely are not reasonably precise. They are general qualitative specifications, rather than " 'detailed, precise and typically quantitative specifications for manufacture of a particular military product.' " *Kleemann,* 890 F.2d at 703 (quoting *Shaw v. Grumman Aerospace Corp.,* 778 F.2d 736, 745 (11th Cir. 1985), *cert. denied,* 487 U.S. 1233 (1988)). I am further convinced by the undisputed facts that the Marine Corps was presented with a prototype of the MK-48 with the same exhaust system, that the Marine Corps tested the prototype and discussed the exhaust system with Oshkosh, yet ordered no changes to the design or location of the exhaust system or the fuel tanks, and that the Marine Corps specifically considered and rejected including an explosion suppressant. Because I find that the provisions on which Oliver and Tate rely are not reasonably precise, but precatory at best, I must conclude, based on the undisputed facts, that the MK-48 conformed to the specifications approved by the Marine Corps.

C. Dangers Known to the Supplier

The third and final element of the government contractor defense is that the supplier warned the government about dangers in the use of the equipment which were known only to the supplier. Oliver and Tate argue that Oshkosh did not inform the Marine Corps that only Diesel Number 2 fuel should be used in the MK-48. The Marine Corps used Jet A-1 fuel, which is more volatile. Oshkosh, according to Oliver and Tate, should have warned the Marine Corps that the Jet A-1 fuel would be more likely to burn in a crash. Specifically, Oliver and Tate state:

> In this case, Oshkosh has taken the position from the beginning that one of the main contributing causes of the explosions was the use by the military of Jet A-1 fuel because Jet A-1 fuel is much more volatile than the specified fuel, Diesel Number 2 (Exhibit "29", ¶ 5; Exhibit "30", ¶ 1). It is clear from the evidence that [Oshkosh] did know that the military was planning to use Jet A-1 fuel in the MK-48; however, it never warned the government that it should use only Diesel Number 2 fuel (Depo. of Lloyd Rank, p. 73-74, Tab 7; Depo. of Maj. John Wozniak, p. 115, Tab 8; Depo. of Martin W. Dankanich, p. 15, Tab 1). In other words, in direct response to the military's inquiries about whether or not it could use Jet A-1 fuel, [Oshkosh] indicated that the use of that alternative fuel would be acceptable. (Exhibit 31, pp. 1, 6, 9, 11-12). [Oshkosh], however, never informed the Government of the knowledge it had that the vehicle was more likely to burn in a crash because Jet A-1 fuel is more volatile than Diesel Number 2 fuel. (Depo. of Danny Lanzdorf, p. 35-36, Tab 5; Depo. of

> Lloyd Rank, p. 73-74, Tab 7; Depo. of Martin W. Dankanich, p. 15, Tab 1; Depo. of Major John Wozniak, p. 115, Tab [8]).

Plaintiffs' Brief in Opposition to Summary Judgment, at 18-19. Oliver and Tate also point to the fact that Oshkosh currently uses a warning label on the MK-48 specifying "Diesel Fuel Only." On its part, Oshkosh argues that it outlined all known risks involving the MK-48 in its safety assessment report, which Oshkosh was required to prepare under the contract. Further, Oshkosh argues that it did not know that the Marine Corps was planning to use Jet A-1 fuel in the MK-48. Instead, Oshkosh notes that it approved temporary use of JP-5 fuel in MK-48s that were used on board ships.

It is necessary, at this juncture, to examine the factual allegations of the parties on this issue, as Oliver and Tate's characterization of the evidence is questionable. Oliver and Tate cite several portions of their Exhibit 31 which mention Jet A-1 (which is similar to the military fuel JP-8). On page 1, which appears to be a telex to Oshkosh, it states, "JP-4, JP-5, and JP-8 can be used in our fuel system on the DA/LVS engine. These fuels can be used for emergency or for intermittent use. If used for continuous use exceeding 600 hours it is recommended to add 5% by volume of lube oil." Page 6, which appears to be part of a report issued by the Army Fuels and Lubricants Research Laboratory, states that the Army approved JP-5 as an alternate fuel to diesel fuel, and that "[b]oth JP-5 and JP-8 are aviation kerosene turbine engine fuels which essentially differ only in their flash and freezing point requirements." Page 9 of the same report states in part, "Non-winterized diesel fuels . . . generally have

relatively high pour and cloud points; therefore, it has been the practice in Alaska to use DF-A or Jet A-1 (JF-8) year-round in all diesel-powered equipment, especially in Fairbanks and Northern regions. For example, all equipment operating on the Alaskan Pipeline during its construction used Jet A-1 with no problems being reported." On page 10, in the conclusion of the report, it states that "JP-5 and JP-8 are acceptable alternatives for DF-2 as fuels in all vehicles and stationary equipment powered by compression-ignition engines" and that "JP-5 or JP-8 should be adequate fuels for the 6.2L diesel-powered high mobility multipurpose wheeled vehicles (HMMWV) and commercial utility and cargo vehicles (CUCV)." The recommendation section of the report, on page 12 of Oliver and Tate's Exhibit 31, states, "Based on the documents reviewed in this report and the extensive experience with the problem-free use of JP-5 and JP-8 in diesel engines within the Army and Navy, it is recommended that JP-8 be considered an alternate to diesel fuel DF-2, in the same manner that JP-5 is now approved as an alternate fuel. . . . "

Oliver and Tate also cite several pages of deposition testimony. Lloyd Rank, Oshkosh's program manager, was asked, "Did Oshkosh ever tell the government that they should not use JP-8 or JA-1 fuels?" He answered,

> Well, my recollection of this and from the review of the documents here is that we were asked specifically whether we would object to using JP-5 fuel during storage and operating conditions during an exercise which involved pre-positioning while the vehicles were aboard ships. Okay? And while there's references to JP-8 and DF-2 and all – there's all kinds of

> references to various fuels in here, the question was – to us was very narrow. It said will we – if we use JP-5 in these conditions, will Oshkosh have – well, it says, "Please indicate whether the JP-5 fuel for general operations use will have any impact on the LVS engine warranty", so he asked a very specific question. In fact, that is the – that's the – that is the question that I picked up and was attempting to respond to. We never did discuss JP-8. I never – I don't think we even discussed that with – even with Captain Wozniak. What he wanted to do was know if Detroit Diesel would void the warranty if we used JP-5 in the LVS engine.

Deposition of Lloyd Rank, at 74. When asked "[D]id you or anyone else at Oshkosh ever tell the government not to use JP-8 fuel in the LVS vehicle?" Rank answered, "I don't think we ever discussed it. Correct. No, no, we did not tell them they couldn't." *Id.* Major John Wozniak, the project officer, testified to the following:

> Q. Do you know anything about any request by the military to use JP-5 and JP-8 fuel in the vehicle?
>
> A. Yes, sir. At some point we had asked Oshkosh Truck Company whether or not we could use the JP fuels and have an effect on the vehicle warranty. We were concerned that the vehicle warranty as it stood may have been voided if we had used any fuel other than the diesel. And the main reason was is on MPS, maritime prepositioned shipping, they don't have diesel fuel. They have jet propellant five, and we also run into jet propellant eight. So our concern was it be able to use the same fuel that we have prepositioned aboard the ships. So a

request was made of Oshkosh about the suitability and the applicability of using this vehicle without voiding the warranty.

Q. What was the response to that?

A. The answer we got back is yes, that it could be used.

Q. And did that include JA-1 fuel?

A. Not specifically. That was never brought up in the discussion. The JA-1 fuel discussion was never brought up until Saudi Arabia when in fact we wanted to use military fuels. JA-1 is a commercial fuel. Now, there is not much of a difference between JA-1 and jet propellant eight. There is [sic] three additives. And this is from talking with the fuel experts at Fort Belvoir. Essentially they are the same except for these additives which are literally in trace amounts in the fuel. They do not substantially make up any large amount of the fuel. So Jet A is substantially the same as jet propellant eight.

Q. Let me ask the same question in regard to JP-8. Did Oshkosh approve that fuel?

A. I'm not sure if they had or hadn't on that one, sir. Jet propellant five I know we had. I don't recollect whether or not we had done jet propellant eight. I'd have to take a look at the documents.

Q. Do you know – Did Oshkosh know that that fuel was going to be used, jet propellant eight?

A. Could you rephrase that question, please?

Q. Did Oshkosh know that the military was going to use jet propellant eight?

> A. Only if we had asked them. And I'd have to take a look at the letter that we went [sic] to them with asking them about the fuels. . . . Otherwise, we would have to infer that they had read into it and looked at all the types of fuels. And that would have been a supposition.
>
> Q. Did they definitely know that fuels other than diesel would be used in the vehicle, diesel number two?
>
> A. Yes, sir.
>
> . . . .
>
> Q. Did anyone from Oshkosh ever warn the military that there was some danger in using fuels other than diesel number two?
>
> A. No, sir. The only concern that had come through is on JP-4. And I think JP-4 was determined not to be an appropriate fuel in the system. JP-4 is much different than JP-5 and JP-8.

Deposition of Major John Wozniak, at 112-115. Corporal Martin Dankanich, one of the convoy drivers, testified that he had never been told not to use Jet A-1 fuel in the MK-48. Deposition of Martin W. Dankanich, at 15. Danny Lanzdorf, Oshkosh's Chief Engineer on the LVS project, testified to the following:

> Q. Do you have any opinion one way or the other as to whether JA-1 fuel would make the LVS vehicle more likely to burn in a crash?
>
> A. The only thing that I can tell you is that the flash point of Jet A fuel is higher than DF-2, and certainly that makes the fuel more volatile.
>
> Q. Would that make the vehicle more likely to burn in a crash or do you know?

> A. If the fuel is more volatile and has a lower flash point, then yes, it would be more likely to – more likely to burn. That would make the JP – or the Jet A fuel more hazardous. I'm not offering an opinion on the degree at this point, but that is a fact, that the volatility and flash point of the two fuels are different, and directionally it makes the Jet A fuel and JP-8 more hazardous.

Deposition of Danny Lanzdorf, at 35-36.

Oshkosh, on the other hand, lists several undisputed facts to the contrary. First, and perhaps most importantly, it is undisputed that the Marine Corps did not inform Oshkosh of its intention to use Jet A-1 fuel in the MK-48. In fact, it did not inform Oshkosh that it intended to use JP-8 fuel. The Marine Corps asked Oshkosh to approve the limited use of JP-5 fuel for prepositioning, which it did. Second, the evidence indicates that the Marine Corps had as much, if not more, knowledge as Oshkosh regarding the relative volatility of the various fuels. Third, the Marine Corps was aware of the danger of explosion because it specifically considered (and, notably, rejected) the inclusion of an explosion suppressant. Additionally, the continuous back and forth between Oshkosh and the Marine Corps in developing the design of the MK-48, including the fuel tanks and exhaust system, makes it more likely that Oshkosh imparted any information it possessed regarding any dangers. And fourth, Oshkosh prepared a safety assessment report which stated, in its General Recommendations on Safety:

> 21. Fuel is very flammable and can explode easily. To avoid serious injury or death, keep fuel away from open fire and keep fire extinguisher within easy reach when working with

> fuel. Do not work on fuel system when engine is hot. Fuel can be ignited by hot engine. Smoking is prohibited while working with fuel.

Defendant's Exhibit G-1, at 22. Additionally, the report identified "fire from vehicle fuel" as a "significant hazard," and diesel fuel as a "hazardous material." *Id.* at 28.

In *Harduvel*, the defendant produced evidence that the Air Force knew of the wire-chafing problem in the F-16 before Captain Harduvel's fatal crash. Further, the defendant presented uncontested evidence that it had not withheld any information regarding the chafing or any other problem from the Air Force. The plaintiff argued that despite that evidence, the defendant "failed to inform the Air Force of the 'seriousness' of the chafing problem, causing the Air Force to take insufficient preventative measures." *Harduvel*, 878 F.2d at 1321. The court disagreed, noting that the record contained no indication that the defendant "possessed knowledge that chafing was a graver danger than was known by the Air Force." *Id.* The court concluded,

> The Air Force was plainly aware of the chafing problem in the F-16 generally, and of the possible serious consequences of chafing. There is no evidence that General Dynamics had knowledge it withheld. Despite its knowledge, the Air Force continued to fly the hundreds of F-16's in operation, and to purchase additional ones. Its decision was simply to address the chafing problem though the regular 100-hour inspections and technical orders. We think the third *Boyle* condition is satisfied here as a matter of law.

Harduvel, 878 F.2d at 1322 (citation omitted).

Here, the undisputed evidence shows that Oshkosh did not warn the Marine Corps that Jet A-1 fuel would be more likely to burn in the event of a crash. However, the third prong of *Boyle* is not that the supplier must warn the government of every possible danger; it's that the supplier must warn the government of the dangers in the use of the equipment that were *known* to the supplier but *not known* to the government. Essentially, Oliver and Tate argue that Oshkosh was aware of two factors: that Jet A-1 fuel was more volatile than diesel fuel, and that the configuration of the exhaust system and the fuel tanks in the MK-48 was such that the fuel could ignite in a crash. And, indeed, the evidence does show that Oshkosh had knowledge of both of these facts. As in *Harduvel*, however, the evidence also shows that the Marine Corps shared that same knowledge. The report contained in Oliver and Tate's Exhibit 31, which discusses the use of JP-5 and JP-8 as alternative fuels to diesel, was prepared by the "fuel experts at Fort Belvoir," the Army's Fuels and Lubricants Research Laboratory. Major Wozniak's deposition testimony indicates that he is familiar with the differences between diesel and jet propellant fuels. And Danny Lanzdorf, Oshkosh's Chief Engineer for the MK-48, based his opinion that Jet A-1 fuel is more volatile than diesel fuel on the higher flash point of Jet A-1, a fact which is contained in the Army's report.

Further, the Marine Corps had the same knowledge as Oshkosh regarding the configuration of the exhaust system and the fuel tanks on the MK-48. The Marine Corps certainly was aware that the fuel could ignite in the event of a crash, because it specifically considered including an explosion suppressant. The Marine Corps

was involved extensively in the development and design of the MK-48. There is nothing to indicate that Oshkosh withheld information concerning the exhaust system or the likelihood that the fuel would ignite in a crash. To quote the *Kleemann* court one last time,

> It is this salient fact of governmental participation in the various stages of the aircraft's development that establishes the military contractor defense. Indeed, active governmental oversight is relevant to all three elements of defendant's burden. Where, as here, the Navy was intimately involved at the various stages of the design and development process, the required governmental approval of the alleged design defect is more likely to be made out. *See Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946, 950-51 (4th Cir. 1989); *Dowd v. Textron Inc.*, 792 F.2d 409, 412 (4th Cir. 1986) [, *cert. denied*, 487 U.S. 1233 (1988)]. Similarly, the Navy's extensive participation, including reservation of the power to approve or disapprove design modifications, enhances the likelihood of final product conformity. Government involvement in the process also makes it more likely, though not certain, that a sharing of information will occur with respect to potential dangers in the use of the equipment. As a final matter, extensive governmental participation provides tangible evidence of the strong federal interest which justifies the creation of a federal common law defense for government contractors in the first place.

Kleemann, 890 F.2d at 701.

Finally, to clinch this last element of the government contractor defense, there is absolutely no evidence to

indicate that Oshkosh even considered the possibility of using Jet A-1 fuel in the MK-48. Without knowledge that the Marine Corps planned to use Jet A-1 fuel in the MK-48, it is difficult to see how Oshkosh withheld information regarding the volatility of the Jet A-1 fuel. Indeed, the evidence shows that the Marine Corps possessed the same knowledge as Oshkosh concerning the separate facts of the volatility of Jet A-1 fuel and the configuration of the MK-48's exhaust system and fuel tanks. I see no reason why Oshkosh should have made, or evidence that it did make, some inference or discovery about the particular volatility of Jet A-1 fuel in the MK-48 that the Marine Corps did not or could not make itself. I conclude, based on the undisputed evidence, that Oshkosh did not fail to warn the Marine Corps of any dangers in the use of the MK-48 that were known to Oshkosh but not to the Marine Corps.

D. Failure to Warn

Oliver and Tate contend that even if I find that Oshkosh has satisfied each of the *Boyle* elements with regard to the design of the MK-48, their failure-to-warn claims under Wisconsin law should survive summary judgment. Oliver and Tate argue that in order for the government contractor defense to apply to a failure-to-warn claim, the defendant must show that the government either prohibited warnings altogether or dictated the content of the warnings.

I disagree with Oliver and Tate's assessment of the law applicable to failure-to-warn claims. None of the parties cites, nor has my own research disclosed, any

Seventh Circuit case on point. In keeping with the federal interests identified by the Supreme Court with regard to design liability, however, it appears prudent to impose a burden on the defendant similar to that announced in *Boyle*. The Sixth Circuit recently addressed the issue in *Tate v. Boeing Helicopters*, 55 F.3d 1150 (6th Cir. 1995). Because I am persuaded by the logic of its analysis, I will quote the court's opinion at length:

> We agree that the defendants' success in establishing the government contractor defense against the design defect claim does not by itself establish a defense to the plaintiffs' failure to warn claim. Several of our sister circuits have applied the government contractor defense against failure to warn claims; those cases do not focus on the underlying design defects, but instead focus on the *warnings*. *In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806, 812-13 (9th Cir. 1992) (dictum); *Dorse v. Eagle-Picher Indus., Inc.*, 898 F.2d 1487, 1489 (11th Cir. 1990); *In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626, 632-33 (2d Cir. 1990). Warning the government of dangers arising from a specific design – the third condition of *Boyle* – does not encompass or state a failure to warn claim; it simply encourages contractors to provide the government with all the information required to soundly exercise its discretion. "By contrast, tort law duties to warn accomplish an entirely different objective of helping those who use or otherwise come into contact with a product to protect their own safety." *In re N.Y. Asbestos*, 897 F.2d at 632. In the government contractor defense context, design defect and failure to warn claims differ practically as well as theoretically. Simply because the government exercises discretion in

approving a design does not mean that the government considered the appropriate warnings, if any, that should accompany the product. This is especially true with regard to military equipment procurement where complex judgments by representatives of the Armed Forces often involve "balancing of many technical, military, and even social considerations." *Boyle*, 487 U.S. at 511. We hold that the government contractor defense [against failure-to-warn claims] is not necessarily established merely by satisfying the government contractor defense conditions as to design defect claims.

Although the rule announced in *Boyle* applies only to design claims, and the government contractor defense as applied against failure to warn claims is independent of design defect claims, *Boyle* provides guidance in determining when state law governing a failure to warn claim can be displaced. The *Boyle* Court explained that the government contractor defense displaces state law when imposing state tort liability "significant[ly] conflict[s]" with a federal interest. *Id.* at 507. As we have seen, there is a federal interest in protecting the government's FTCA exemption for discretionary functions. When the government exercises its discretion and approves designs prepared by private contractors, it has an interest in insulating its contractors from liability for such design defects. *Id.* at 511-12. Similarly, when the government exercises its discretion and approves warnings intended for users, it has an interest in insulating its contractors from state failure to warn tort liability.

Accordingly, the rationale for applying the government contractor defense to a failure to warn claim tracks the *Boyle* analysis closely. When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not. As in design defect cases, in order to satisfy the first condition – government "approval" – in failure to warn cases, the government's involvement must transcend rubber stamping. And where the government goes beyond approval and actually determines for itself the warnings to be provided, the contractor has surely satisfied the first condition because the government exercised its discretion. The second condition in failure to warn cases, as in design defect cases, assures that the defense protects the government's, not the contractor's, exercise of discretion. Finally, the third condition encourages frank communication to the government of the equipment's dangers and increases the likelihood that the government will make a well-informed judgment. . . .

. . . Several of the cases decided in our sister circuits indicate that the contractor must show "that the Government itself 'dictated' the content of the warnings," *In re N.Y. Asbestos*, 897 F.2d at 630 (quoting *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598, 604 (D. Conn. 1988)), or that the United States imposed a "prohibition

> against health warnings," *Dorse*, 898 F.2d at 1489. We reiterate that the FTCA's discretionary function exemption delineates the contours of the defense. Government *discretion* is required, not dictation or prohibition of warnings. Where a contractor proposes warnings that the government substantively approves, and satisfies the second and third conditions, the defense displaces state law – even if the government did not "prohibit" the contractor from proposing more alarming warnings.

Tate, 55 F.3d at 1156-57 (parallel citations omitted).

I agree that establishing government dictation or prohibition seems too onerous a burden in light of the reasoning of the *Boyle* Court. Thus, if the undisputed facts show that Oshkosh submitted proposed warnings to the Marine Corps which the Marine Corps subsequently substantively approved and to which the vehicles conformed, then summary judgment in Oshkosh's favor is appropriate, as I have already determined that Oshkosh did not fail to warn the Marine Corps of any dangers associated with the type of fuel used in the MK-48 of which Oshkosh had knowledge but the Marine Corps did not.

With its reply brief, Oshkosh submitted an affidavit of Danny Lanzdorf, Oshkosh's Chief Engineer for the MK-48. Lanzdorf states that among the plans, drawings, and specifications submitted by Oshkosh to the Marine Corps were proposed warnings. Additionally, Lanzdorf states, with supporting exhibits, that the Marine Corps decided to exclude information regarding protection of the fuel tanks from fire or explosion from the Performance Specification for the MK-48. Oliver and Tate have

failed to provide any evidence to dispute Lanzdorf's affidavit.[5] Further, I note that Oliver and Tate's argument is that Oshkosh should have warned the Marine Corps specifically against the use of Jet A-1 fuel in the MK-48. As I determined earlier, there is absolutely no evidence to indicate that Oshkosh even considered the possibility of using Jet A-1 fuel in the MK-48. Without knowledge that the Marine Corps planned to use Jet A-1 fuel in the MK-48, it is difficult to see how Oshkosh should have formulated warnings regarding the volatility of the Jet A-1 fuel.

Incorporating (without repeating) the rather lengthy analysis in which I engaged above, I find that the undisputed facts show that Oshkosh submitted proposed warnings to the Marine Corps which the Marine Corps subsequently approved in part. That approval was not merely a rubber stamp, but the result of an extensive dialogue between Oshkosh and the Marine Corps. The vehicles provided by Oshkosh conformed to the specifications, including those regarding warnings, approved by the Marine Corps. And, finally, Oshkosh did not fail to warn the Marine Corps of any dangers in the use of the MK-48 that were known to Oshkosh but not to the Marine Corps. Thus, I conclude that Oshkosh has established the government contractor defense against Oliver and Tate's failure-to-warn claims as well.

---

[5] Although the substance of Oshkosh's argument was made in its reply brief, I allowed Oliver and Tate to file supplemental briefs with attached exhibits. Oliver and Tate did not address this issue in their supplemental briefs.

III. CONCLUSION

I find that Oshkosh has established each of the elements of the government contractor defense and therefore is entitled to summary judgment as a matter of law. The accident on Khanjar Expressway, which took Lance Corporal Oliver's life and Corporal Tate's leg, was tragic and unfortunate. As Justice Powell wrote in *Harduvel*,[6] however, "Although the defense may sometimes seem harsh in its operation, it is a necessary consequence of the incompatibility of modern products liability law and the exigencies of national defense." 878 F.2d at 1322.

Accordingly,

IT IS ORDERED that the motion for summary judgment, filed by the defendant, be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED that the motion for leave to file a supplemental brief in opposition to the motion for summary judgment, filed by the plaintiff, be and the same is hereby **GRANTED**; and

IT IS FURTHER ORDERED that the motion to strike the plaintiff's supplemental brief and affidavit in opposition to the motion for summary judgment, filed by the defendant, be and the same is hereby **DENIED**; and

IT IS FURTHER ORDERED that the above-captioned matters be and the same are hereby **DISMISSED** with prejudice.

---

[6] Justice Powell, retired at the time, sat by designation and wrote the court's opinion.

The clerk is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 16th day of January, 1996.

BY THE COURT:

/s/ J. P. Stadtmueller
J. P. Stadtmueller
Chief Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

DONNA SCOTT OLIVER

V.

OSHKOSH TRUCK CORPORATION

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-C-206

ERIK B. TATE AND SHIRL D. O'BRIEN-TATE

V.

OSHKOSH TRUCK CORPORATION

CASE NUMBER: 94-C-43

DECISION BY COURT. THIS ACTION CAME ON FOR CONSIDERATION BEFORE THE COURT AND A DECISION HAS BEEN RENDERED.

IT IS ORDERED AND ADJUDGED THAT THE MOTION FOR SUMMARY JUDGMENT, FILED BY THE DEFENDANT, BE AND THE SAME IS HEREBY GRANTED;

IT IS FURTHER ORDERED THAT THE MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT, FILED BY THE PLAINTIFF, BE AND THE SAME IS HEREBY GRANTED;

IT IS FURTHER ORDERED THAT THE MOTION TO STRIKE THE PLAINTIFF'S SUPPLEMENTAL BRIEF AND AFFIDAVIT IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT, FILED BY THE DEFENDANT, BE AND THE SAME IS HEREBY DENIED; AND

IT IS FURTHER ORDERED THAT THE ABOVE-CAPTIONED MATTERS BE AND THE SAME ARE HEREBY DISMISSED WITH PREJUDICE.

JANUARY 16, 1996
DATE

SOFRON B. NEDILSKY
CLERK

/s/ Michael Kramer
(BY) DEPUTY CLERK

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 25, 1996.

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

DONNA S. OLIVER, Administratrix of the Estate of Arthur DWAYNE OLIVER, Plaintiff-Appellant,	Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 96-1320	
v.	No. 93 C 206
OSHKOSH TRUCK CORPORATION, Defendant-Appellee,	No. 94 C 43
	J. P. Stadtmueller, Chief Judge.
ERIK B. TATE and SHIRL D. O'BRIEN-TATE, Plaintiffs-Appellants,	
No. 96-1321	
v.	
OSHKOSH TRUCK CORPORATION, Defendant-Appellee.	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed on October 7, 1996

by plaintiffs-appellants, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition. Accordingly.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby DENIED.

No. 96-1007

Supreme Court, U.S.
FILED
FEB 7 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

DONNA S. OLIVER, Administratrix of the Estate of ARTHUR DWAYNE OLIVER,

Petitioner,

v.

OSHKOSH TRUCK CORPORATION,

Respondent.

ERIK B. TATE and SHIRL D. O'BRIEN-TATE,

Petitioners,

v.

OSHKOSH TRUCK CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Seventh Circuit correctly granted Oshkosh Truck Corporation summary judgment regarding Petitioners' design and failure-to-warn claims.

LIST OF INTERESTED PARTIES

The names of all parties to the proceedings appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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STATEMENT OF THE CASE

I. Nature of Case and Course of Proceedings

During the spring of 1991, while serving in Operation Desert Storm, Lance Corporal Arthur Oliver was a member of the Marine Corps with Company A, 8th Motor Transport Battalion, 2d Force Service Group. (R.1, ¶ 9) As part of his service, Oliver operated a Logistics Vehicle System truck MK-48 ("MK-48") manufactured by Oshkosh Truck Corporation ("Oshkosh"). On March 23, 1991, while operating a MK-48, Oliver lost control of the vehicle and crashed into several other MK-48s with which he was traveling in a convoy. Oliver died as a result of the crash. Corporal Erik B. Tate, who was a passenger in the MK-48 driven by Oliver, suffered serious injuries. Suit was subsequently brought against Oshkosh alleging various claims. Oshkosh sought, and was granted, summary judgment dismissing the Petitioners' claims in their entirety. This ruling was upheld by the Seventh Circuit. The Petitioners now seek a Writ of Certiorari from this Court.

II. Statement of Facts[1]

To properly understand the issues presented it is necessary to consider the process involved in the Marine Corps' procurement of the MK-48. During the 1970's and 1980's, the Department of Defense envisioned an ever increasing reliance on the Military Sealift Command and

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[1] Petitioners' overview of the facts was in many respects adverse to those cited by the underlying courts and not as expansive as Respondent feel necessary.

the commercial shipping fleet to support large scale military operations. (R.32, Ex. A, p. 2) Because the commercial shipping fleet was transforming from bulk cargo ships to container ships, and because the vehicles then available were inadequate in performance, the Marine Corps concluded that it needed to make appropriate changes in its logistics support system to adapt. (*Id.*) Accordingly, in the late 1970's the Marine Corps began the process of upgrading its tactical vehicle fleet. The MK-48, which was designed to perform the tasks of several different vehicles, ultimately became part of this upgrade. (*Id.* at 1)

In October, 1976, as a result of a study titled "Analysis of the Validity of a Conceptual Vehicle Mix as a Means of Providing Motor Transport Services to the Fleet Marine Forces," the Marine Corps began to develop a modern tactical vehicle fleet. (*Id.* at 3) The Marine Corps initial efforts to develop this fleet were not successful. For example, in 1977 the Marine Corps attempted to match then-available commercial tractors with various heavy haul trailers. (*Id.* at 7) It became readily apparent that the commercial tractors would not meet Marine Corps requirements. (*Id.*) On December 4, 1978, the Marine Corps publicly solicited responses from the heavy automotive and construction equipment industries that might meet the Marine Corps' requirements. (*Id.* at 8) Twenty-one companies, including Oshkosh, responded and a dialogue was opened with several of them. (*Id.*)

During this period of time, the Marine Corps developed performance specifications, selection criteria, and a test planning document for the needed vehicle and trailer. (*Id.*) The performance specifications and selection

criteria were sent to participating companies in July, 1979. (*Id.*) In March 1980, the Marine Corps initiated a military procurement process known as a "Request for Proposal" ("RFP") to find a manufacturer to build a prototype MK-48. (Dep. of Maj. John Wozniak, p. 14) The RFP defined the specification requirements – operational, performance, and containment. (*Id.* at 16) Eventually, ten companies, including Oshkosh, presented proposals for the project. (*Id.* at 9) The proposal vehicle by Oshkosh was made from a blank sheet of paper and was designed exclusively to meet the Marine Corps' specification requirements. (Dep. of Danny Lanzdorf, p. 17) In fact, the Marine Corps specifications were the baseline for the MK-48. (Wozniak dep., p. 64) The proposed vehicle was very unique and not commercial in any respect. (*Id.*)

Under the military procurement process, the Source Selection Evaluation Committee was responsible for evaluating the various proposals. (*Id.* at 32) The Committee consisted of non-contracting civilian and military engineers. (*Id.* at 33-34) The evaluation process was totally independent of the vendors. (*Id.*) Further, all proposals were subject to lengthy, in-depth evaluations by both the U.S. Army Tank Automotive Command and Marine Corps Headquarters. (R.32, Ex. A, p. 9) After the evaluations, both organizations reached the same conclusion: only the Oshkosh proposal was acceptable. (*Id.*) Consequently, the Committee recommended the procurement of two 22.5 ton prototype MK-48s from Oshkosh. The prototype contract was signed on September 18, 1980, and the prototypes were delivered to Camp Lejeune for Marine Corps testing and evaluating in April, 1981. (*Id.* at 14)

The Marine Corps managed the MK-48 acquisition with a team consisting of the following: *Acquisition Sponsor Project Officer*, who was responsible for developing, coordinating, and monitoring the engineering aspects and the integrated logistics support (operator and maintenance manuals) for each MK-48 (Wozniak dep., p. 17); *Development Project Officer*, who was responsible for taking the available research and development funds and researching and executing a development contract that would effectively test the prototype (*Id.* at 18); *Operational Test Project Officer*, who was responsible for insuring that all operational tasks were effectively planned, conducted, evaluated, and reported. (*Id.*) This Officer also prepared the test design and test plan, supervised operational testing, and evaluated and analyzed the results. (*Id.*) The Marine Corps established testing procedures and controlled and conducted all testing on the prototypes submitted by Oshkosh. (*Id.* at 22) The specification requirements and testing criteria were outlined in the prototype contract. The prototypes were built only after extensive discussions between military representatives, military engineers, and Oshkosh engineers. (R.32, Ex. C)

The Marine Corps' testing procedures evaluated the development and engineering design of the vehicle. (Wozniak dep., pp. 23, 42; *See also*, R.32, Ex. C, Operational Testing Plan, pp. 1-3) The testing was broken up into three categories: operational, performance, and developmental. (Wozniak dep., pp. 29-30) Extensive testing was performed by the Marine Corps at a number of locations, including Camp Lejeune, Camp Pendleton, Isle of Palms, Aberdeen Proving Grounds, and Quantico. (*Id.* at 28) It is important to note that the Marine Corps did

not consider crash testing any of the vehicles. (*Id.* at 181-182)

Based on test results, the Marine Corps determined that a large number of modifications needed to be made before production could begin on the MK-48. (*Id.* at 20) The tests provoked substantial discourse between the Marine Corps and Oshkosh regarding all aspects of the MK-48 including problems and their eventual solution. (*Id.* at 25) Thirty (30) million miles of testing was done on the MK-48 vehicle. (*Id.* at 138) There were literally hundreds and hundreds of changes during the development of the MK-48 vehicle from the initial prototype through final production, and Oshkosh carried out each one through continuous dialogue with the Marine Corps. (*Id.* at 25, 26-31; *See also*, R.32, Ex. D – list of modifications ordered by the Marine Corps)

The Marine Corps was responsible for the location and the type of fuel tanks on the MK-48. (Lanzdorf dep., p. 43) The Marine Corps specified that the fuel system had to meet Federal Motor Carrier Safety Regulation requirements 383.65 and 393.67. However, the Marine Corps did not make any request for changes in the location of the fuel tanks or exhaust system in order to obtain compliance with these requirements. (Wozniak dep., pp. 30-31) In fact, the exhaust system and fuel tanks on the prototype MK-48 remained in the same location throughout the design and development process, and the Marine Corps was completely aware of this important fact. (*Id.* at 30; R.40, Ex. E-Wozniak dep. Exhibit 31 which shows the exhaust system was 7.6 cm from the fuel cap)

Before final production, the Marine Corps decided it wanted to use "Explosafe" material in the fuel tanks. (Lanzdorf dep., p. 43) The Marine Corps then changed its mind and specified "Scott Foam" material. (*Id.* at 43) Both these materials are explosion suppressants. At the Marine Corps request, Oshkosh designed them into the fuel system. However, just before final production, the Marine Corps decided to eliminate any type of explosion suppressant material from the fuel system design. (*Id.* and Wozniak dep., p. 41) The Marine Corps also considered and decided not to use armor material around the fuel tanks. (*Id.* at 42-47 and Wozniak dep., p. 28)

Once the MK-48 design had been modified sufficiently to pass Marine Corps testing, Oshkosh was awarded the Production Contract on September 16, 1983. The final production specification and dimension requirements were set forth in the Production Contract. (R.32, Ex. E) The fuel tanks on the MK-48 were provided to Oshkosh by Cutler Metal Product Company. Cutler certified that the fuel tanks and liquid fuel system met FMCSR 393.65 and 393.67. (Lanzdorf dep., p. 80) Oshkosh also certified that the fuel tanks and liquid fuel system conformed to FMCSR. (*Id.* at 77) Additionally, although the Marine Corps did not require certification with regard to the exhaust system, the exhaust system did comply with FMCSR 393.83. (*Id.*)

The exhaust and fuel system had already been designed and tested before the signing of the Production Contract and therefore no changes could be made without express government approval. (Wozniak dep., p. 59)

The placement of the exhaust and fuel system was provided by the Marine Corps' various specification requirements. (*Id.* at 37-38, 66) Initially, Oshkosh tried to put the exhaust system on the right side of the vehicle away from the fuel tank, which was planned to be on the left side. However, when the military insisted on having a larger fuel capacity, fuel tanks were added on both sides. (Dep. of Herbert Dobbs, p. 115). Therefore, this ruled out putting the exhaust on the opposite side of the fuel tank. Next, because of the performance specification that the MK-48 be able to ford through 5 feet of water, the fuel tank and engine needed to be located at least 60" above ground. (Lanzdorf dep., p. 38) Also, because of the performance specification that required the MK-48 to fit in a container 8' x 8' x 20', the exhaust and fuel systems needed to fit in an 36" envelope – located between 60" and 96" off the ground. (*Id.*) In order to meet these specifications, the exhaust system was designed to lie horizontally over the top of the fuel tank within the 36" constrained area. Therefore, when you take into account the diameter of the exhaust system that is approximately 12", the space that is available to put the exhaust in the already compact area is further limited. (*Id.* at 38)

It is important to note that during the initial design of the MK-48 the exhaust system was located at a greater distance away from the fuel tank. (*Id.* at 40) That was because the overall height that the military was requesting was 102". Thereafter, the Marine Corps changed this specification and reduced the overall height from 102" down to 96". Thus, the exhaust system was moved 6" closer to the fuel tank. (*Id.*)

The height restrictions dictated the placement of the exhaust system. The overall height of the MK-48 when connected to the front end module is 102", but when the vehicle is disconnected, the yaw strut on the front power unit is used to tilt the vehicle so that the radiator line and the exhaust line come into plane with the 96" line. Therefore, the exhaust and radiator systems slope rearward at an angle so that when the vehicle is tilted forward, it can be packaged in a container within the 96" requirements. (*Id.* at 57) If the government thought there was a problem with the exhaust and fuel system configuration, they would have taken exception to the configuration and had authority to change it. (Wozniak dep., pp. 65, 181; Dobbs dep., p. 73)

Pursuant to the Production Contract, Oshkosh presented the Marine Corps with a drawing package that specifically showed the location of the exhaust system and fuel tanks. The drawings were prepared through a collaborative effort between the Marine Corps and Oshkosh. Furthermore, this package depicted the precise location of warnings on the MK-48. (R.40, Ex. B; Lanzdorf dep., p. 97; and Wozniak dep., pp. 66-67) The Contract also required Oshkosh to provide a "Safety Assessment Report." (R.32, Ex. G) The purpose of the Safety Assessment Report was for Oshkosh to provide an evaluation of the safety risks existing during the test and operation of the vehicles. The report identifies safety features and procedural hazards and precautions that should be followed. Specifically, Oshkosh's Safety Assessment Report provided that "Fuel is very flammable and can explode easily" . . . "Fuel can be ignited by hot engine." (R.32, Ex.

G-1) The Marine Corps also performed their own safety assessments. (Wozniak dep., p. 181)

The Production Contract prohibited Oshkosh from making any changes to the MK-48 without the express approval of the Marine Corps. The various contracts also specified elaborate procedures for the control and monitoring of the configuration of the MK-48. (Wozniak dep., pp. 59-60) Each proposed change was thoroughly reviewed by the Marine Corps before implementation. (*Id.* at 62) The Marine Corps instituted a "total design responsibility" clause into the Production Contract, but the provision was simply boiler plate language taken from Army contracts. (*Id.* at 59-60, 62, 70-75) In fact, the design was frozen at the time the total design responsibility language was agreed upon and the Production Contract was signed. (Dep. of Lloyd Rank, pp. 128, 157, 65; R.32, Ex. E, C.6.1, p. 37)

Finally, the Production Contract required a Marine Corps representative to inspect each completed MK-48 vehicle. (*Id.* at 60; *See also,* R.32, Ex. E3) The Marine Corps representative was authorized to accept or reject the vehicle. A vehicle that did not comply with the Marine Corps specifications would be given back to Oshkosh for corrections. (*Id.* at 61) Ultimately, the Marine Corps purchased about 1,600 vehicles from Oshkosh in 1988. (*Id.* at 66) In sum, the MK-48 was the product of extensive coordination between private and government research entities spanning sixteen (16) years and costing some $7.5 million in private research funds and $5 million in government research and development money. (R.32, Ex. A, p. 13)

ARGUMENT FOR DENYING WRIT OF CERTIORARI

I. THE SEVENTH CIRCUIT CORRECTLY FOUND THAT THE GOVERNMENT CONTRACTOR DEFENSE APPLIED TO PETITIONERS' FAILURE-TO-WARN CLAIM.

A. OSHKOSH SUBMITTED PROPOSED WARNINGS TO THE MARINE CORPS WHICH THE MARINE CORPS SUBSTANTIVELY EVALUATED, APPROVED, AND TO WHICH THE VEHICLES CONFORMED.

The district court ruled that:

> the undisputed facts show that Oshkosh submitted proposed warnings to the Marine Corps which the Marine Corps subsequently approved in part. The approval was not merely a rubber stamp but the result of an extensive dialogue between Oshkosh and the Marine Corps. The vehicles provided by Oshkosh conformed to the specifications, including those regarding warnings, approved by the Marines Corps. And, finally, Oshkosh did not fail to warn the Marine Corps of any dangers in the use of the MK-48 that were known to Oshkosh but not to the Marine Corps.

(App., p. 80a) Similarly, the Seventh Circuit ruled that:

> upon examination of the record, we believe that the district court properly granted summary judgment to the defendant. We believe that the undisputed facts of the record show that Oshkosh complied with "reasonably precise specifications" imposed on it by the Marine Corps with respect to the warnings on the MK-48 and that the contractor provided those

> warnings required by the government. . . . With respect to the final element of the government contractor defense, we note our earlier conclusion that Oshkosh did not fail to warn the Marine Corps of any dangers in the use of the MK-48 that were known to Oshkosh but not to the Marine Corps. Under these circumstances, the district court properly entered summary judgment to Oshkosh on the plaintiffs' failure-to-warn claims.

(App., p. 25a) In rendering these decisions the underlying federal courts disagreed with Petitioners' assertion that in order for the government contractor defense to apply to failure-to-warn claims, the contractor must show that the government either prohibited warnings or dictated the content of the warnings. The courts closely followed the government contractor defense criteria outlined by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 101 L.Ed.2d 442 (1988).

There is little question that under appropriate circumstances the government contractor defense is applicable to failure-to-warn claims. However, Petitioners argue that the Seventh Circuit's ruling is flawed and that there is a conflict in authority with respect to the application of the government contractor defense to failure-to-warn claims. In contrast, Respondent submits that the Seventh Circuit correctly applied the government contractor defense based on the undisputed facts and further that no genuine and/or intolerable conflict is presented by the lower federal court.

Before addressing Petitioners' conflicting authority argument, it is important to first set forth why and how

the *Boyle* case is applicable to both design defect and failure-to-warn claims. The government contractor defense, a discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. Sec. 2680(a), ("FTCA"), provides government contractors immunity from liability. In other words, the government contractor defense is derived from the government's immunity from suit when the performance of a discretionary function is at issue. This Court in *Boyle* affirmatively recognized and defined the scope, purpose and requirements that need to be met in order for the government contractor defense to apply. This Court held that work performed by an independent contractor for the federal government is an area of "uniquely federal interest" and that the selection of the appropriate design for military equipment is assuredly a "discretionary function" not subject to suit. *Boyle*, 487 U.S. at 504. This Court explained:

> It [discretionary function] often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments, see *U.S. v. Varig Airlines*, 467 U.S. 797, 814, 104 S. Ct. 2755, 2765, 81 L.Ed.2d 660 (1984), through state tort suits against contractors would produce the same effects sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover,

> or to insure against, contingent liability for the government-ordered designs. To put the point differently: It makes little sense to insulate the government against financial liability for the judgment that a particular feature of military equipment is necessary when the government produces the equipment itself, but not when it contracts for the production. In sum, we have the view that state law which holds government contractors liable for design defects in military equipment does in some circumstances present "significant conflict" with federal policy and must be displaced.

Id. at 511-12.

This Court premised the application of the government contractor defense on a "significant conflict" between state law and an area of federal concern, such as the procurement of military equipment. *Id.* at 507. The requisite "significant conflict" need not be as sharp as the clearer need for the federal government to regulate, for example, commercial paper. However, a certain degree of conflict must exist before pre-emption and the government contractor defense are triggered. *Id.* This Court established a three-part test to determine if the government contractor defense applies:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers and the use of the equipment that were known to the supplier but not to the United States.—

Id. at 512. The first two elements of the *Boyle* test ensure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third element is necessary to eliminate any incentive that the government contractor defense may create for contractors to withhold knowledge of risks. *Id.* This is precisely the test followed by the Seventh Circuit in this case.

In reaching its decision the Seventh Circuit concluded that the three-part *Boyle* test provides guidance in determining if a conflict exists and when state law governing a failure-to-warn claim can be displaced. The court ruled that:

> because similar policy considerations control both design defect and failure-to-warn situations, *Boyle* provides substantial guidance in determining whether state law governing a failure-to-warn claim can be displaced. *See Id.* at 1157. In both cases, the discretionary aspect of the federal government's contracting function must define the boundaries of the government contractor defense. *See Boyle*, 487 U.S. at 511-12. In *Boyle*, the Supreme Court established the requirement that the 'government approve reasonably precise specifications' as the test of whether a particular case implicates a discretionary function of the government. 487 U.S. at 512. We believe that the same touchstone ought to govern in the context of failure-to-warn claims. As the Sixth Circuit put it, '[w]hen the government exercises its discretion and approves designs prepared by private contractors, it has an interest in insulating its contractors from liability for such design defects.

> Similarly, when the government approves warnings intended for users, it has an interest in insulating its contractors from state failure-to-warn tort liability.' *Tate*, 55 F.3d at 1157. Thus, when state law would otherwise impose liability for a failure-to-warn, that law can be displaced when the contractor can show that: (1) government exercised its discretion and approved certain warnings; (2) the contractor provided the warnings required by the government; (3) the contractor warned the government about dangers in the equipment's use that were known to the contractor but not to the government.

(App., pp. 23a-24a).[2]

The underlying federal courts in this case have adopted the *Boyle* rationale as guidance and overwhelmingly decided that Oshkosh has met its burden of proof with respect to the government contractor defense regarding Petitioners' failure-to-warn claim. The Seventh Circuit determined that Oshkosh submitted proposed warnings to the Marine Corps which the Marine Corps substantively evaluated, approved and to which the MK-48 conformed.[3] Further the court ruled:

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[2] It is apparent from the Seventh Circuit's ruling that they researched and analyzed the failure-to-warn issue extensively. In fact, they were critical of a number of the same cases cited by the Petitioners. (App., 24a, Fn. 8). The court said it was more prudent to impose a burden on the contractor similar to that announced in *Boyle* because FTCA's discretionary function exemption delineates the contours of the defense.

[3] The authority cited by Petitioners in *Dube v. Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989), has no bearing on this case and is factually dissimilar. The *Dube* case discussed the government's (Navy) duty to warn not a contractor's.

> that the undisputed facts of record show that Oshkosh complied with 'reasonably precise specifications' imposed on it by the Marine Corps with respect to the warnings on the MK-48 and that the contractor provided those warnings required by the government. In this respect, Oshkosh invites us to the affidavit of Danny J. Lanzdorf, Oshkosh's Chief Engineer for the MK-48. Paragraph 2 of his affidavit provides that '[h]undreds of plans, drawings and specifications were submitted to the U.S. Marine Corps, but the [drawings] attached [to the affidavit] are representative of those reviewed and approved.' R.40, Ex.B, at Par. 2. The drawings attached to the affidavit show several different views of the MK-48 and depict the location of the warnings and component parts such as the exhaust system, mufflers and the fuel tank. With respect to the final element of the government contractor defense, we note our earlier conclusion that Oshkosh did not fail to warn the Marine Corps of any danger in the use of the MK-48 that were known to Oshkosh but not to the Marine Corps.

(App., p. 25a). It is clear that the Marine Corps was intimately aware of the proximity of the exhaust system and the fuel tanks, and any alleged inherent danger. To suggest otherwise would be ridiculous, considering the Marine Corps' extensive involvement in the procurement of the MK-48. *See also, Stout v. Borg-Warner Corp.*, 93 F.3d 331, 337 (5th Cir. 1991), where the court ruled that the contractor has no duty to warn of obvious hazards.

Finally, Petitioners' argument on page 11 of their brief is without merit mainly because it mischaracterizes the Seventh Circuit's decision on the warning issue. The

Seventh Circuit's decision on page 17a dealt with the final element of the *Boyle* test as it pertained to the Petitioners' design defect claim. There the court found that Oshkosh did not possess any greater knowledge than the Marine Corps about the likelihood of an exhaust-ignited fuel fire arising from a collision. (App., p. 17a) The court did not find that the warnings failed to show that the Marine Corps was aware of the danger of the exhaust system configuration, as asserted by the Petitioners. As stated above, the undisputed facts show that Oshkosh complied with reasonably precise specifications imposed on it by the Marine Corps with respect to the warnings on the MK-48 and that Oshkosh provided those warnings. (App., p. 25a)

B. NO GENUINE CONFLICT IN AUTHORITY EXISTS REGARDING THE APPLICATION OF THE GOVERNMENT CONTRACTOR DEFENSE TO FAILURE-TO-WARN CLAIMS.

The Seventh Circuit elected to follow the *Boyle* rationale or principle more closely than other courts, however, this does not create a conflict in authority.[4] Most courts recognize that the government contractor defense may apply to failure-to-warn claims and, in making this decision, they assess the amount of government discretion involved in the warnings process. In fact, in one way or

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[4] No genuine or plain conflict exist among the federal courts on the failure-to-warn issue and most of the decisions turn on the unique facts presented in each case. *Kamberos v. GTE Automatic Electric, Inc.*, 454 U.S. 1060, 102 S. Ct. 612, 70 L.Ed.2d 599 (1981).

another they rely on the *Boyle* rationale when determining whether the government contractor defense applies to failure-to-warn claims.

The cases cited by the Petitioners are factually distinguishable from this case and must be closely scrutinized. First, a number of the cases do not stand for the proposition set forth by the Petitioners. Secondly, all the decisions are based on the facts and circumstances unique to each case. Finally, some of the cases cited simply define the government contractor defense too narrowly. For example, the Second Circuit's ruling in *In re: Joint E. & S. District New York Asbestos Litigation*, did not definitively provide that the government must dictate or prohibit warnings. The court simply said that the government must remain the agent of decision which the Marine Corps has in this case. *New York Asbestos*, 897 F.2d 626, 630 (2d Cir. 1990). The Fifth Circuit's ruling in *In re: Air Disaster At Ramstein Air Base Germany*, did not make a precedential ruling as petitioners assert. But found that the government contractor defense may apply to failure-to-warn claims if there is evidence that the government was involved in the decision to give or not to give a warning. Actually, the court looked to *Boyle* when it reviewed whether the government exercised sufficient discretion with respect to warnings. *In re: Air Disaster*, 81 F.3d 570 (5th Cir. 1996).[5]

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[5] Recently the Fifth Circuit clarified its decision in this case by ruling that under Georgia law a manufactuer does not have a duty to warn the military or pilots of dangers inherent in the design of the aircraft in question. 88 F.3d 341 (5th Cir. 1996). *See also, McCoy v. Unisys Corporation*, 1996 U.S. District LEXIS 4349, wherein a district court in the Fifth Circuit ruled against

The Ninth Circuit ruling in *Butler v. Ingalls Shipbuilding, Inc.*, also follows *Boyle* closely and is not as rigid as Petitioners submit. The court ruled that the government contractor defense may apply to a state failure-to-warn claim where the evidence shows that the contractor was "acting in compliance with 'reasonably precise specifications' imposed on it by the United States." *Butler*, 89 F.3d 582, 586 (quoting *In re Federal Asbestos Cases*, 960 F.2d at 813 (quoting in turn *Boyle*, 487 U.S. at 512)) (citing *In re New York Asbestos Litigation*, 897 F.2d at 629-32).[6] Finally, the Eleventh Circuit in *Dorse v. Eagle-Pilcher Industries, Inc.*, 898 F.2d 1487 (11th Cir. 1990), did not make an outright ruling that the government must prohibit or dictate warnings. In fact, in that case the government was not at all involved in the warning process. It is easy for the courts to reach a decision when the government is not involved in the warning process because the courts do not need to conduct any kind of analysis to determine if

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Petitioners' proposed restrictive view of the government contractors defense.

[6] A similar decision was reached by the same circuit in *In re: Hawaii Federal Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992). In that case the court decided that asbestos was not military equipment and thus the contractor was not entitled to the government contractor defense. The government was not involved in the warning process which is generally consistent with all the asbestos cases cited by Petitioners. Petitioners mainly rely on asbestos cases to support their agruments. However, a recent district court has intimated that the policy considerations driving application of the governement contractor defense are not present in asbestos cases. *Good v. Armstrong World Industries, Inc.*, 914 F. Supp. 1125 (E.D.Pa. 1996) (court indicates that it is common knowledge that asbestos is dangerous)

the government exercised sufficient discretion over the warning process. This of course is not the case with respect to Oshkosh and the Marine Corps, where it is undisputed that the Marine Corps was substantially involved in the warnings process.[7]

The *Russek* case is a decision based solely on the facts and circumstances unique to it and does not set forth a separate test. In the *Russek* case the district court ruled that a failure-to-warn claim is a defect in the design of a product pursuant to New Jersey law and thus the government contractor defense was applied equally to both the plaintiff's design defect and failure-to-warn claims. The only part of this case that is helpful is that the court utilized the *Boyle* analysis and ruled that government approval (discretion) is necessary, not creation of warning specifications. *Russek v. Unisys Corp.*, 921 F. Supp. 1277, 1294 (D.N.J. 1996).[8]

Contrary to Petitioners' belief, there is not a genuine and/or intolerable conflict. As outlined above, the court's

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[7] Nor is this the case in *Tate v. Boeing Helicopters*, 55 F.3d 1150 (6th Cir. 1995). *See also, Wisner v. Unisys Corp.*, 917 F. Supp. 1501 (D.Kan. 1996), *Andrew v. Unisys Corp.*, 936 F. Supp. 821 (W.D.Okl. 1996), and *Fagans v. Unisys Corp.*, 945 F. Supp. 3 (D.D.C. 1996). Contrary to the cases cited by the Petitioners these are cases where the courts were faced with actually assessing active government involvement in the warning process.

[8] Respondent draws this Court's attention to footnote 8 in *Russek* as further support for our position that asbestos cases are unique and distinguishable from the procurement of other military equipment.

decisions vary based on the facts and circumstances surrounding each procurement of military equipment.[9] It is clear from analyzing these cases that the courts are attempting to measure governmental discretion by utilizing some form of the *Boyle* rationale. Therefore, as long as the government considers and approves warnings, as they have in the present case, the government contractor defense will apply. In other words, the Marine Corps does not have to dictate the warnings. It is sufficient that the Marine Corps exercised discretion over the warnings, as they did over the entire procurement process.

In sum, the government contractor defense applies to Petitioners' failure-to-warn claim. Liability for a failure-to-warn claim would have the same negative effect in military procurement as a design defect claim outlined in *Boyle*. The Marine Corps' consideration and approval of the warnings is representative of the required governmental discretion outlined in *Boyle*. The facts are undisputed concerning the Marine Corps in-depth and extensive involvement in the design and testing of the MK-48. The Marine Corps and Oshkosh designed and built the MK-48 from a blank sheet of paper to be used by the Marine Corps in the carrying out of national defense. The Marine Corps was intimately involved in the review and approval of all warnings placed on the MK-48 and the evidence provided by Oshkosh still goes unrefuted today. (*See*, R.40, Ex.B). Therefore, the Seventh Circuit was correct in ruling that the Marine Corps exercised its

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[9] Interpreting discretionary function of the government should be decided on a case by case basis. *U.S. v. Varig Airlines*, 467 U.S. 797, 104 S. Ct. 2577, 81 L.Ed.2d 660 (1984).

discretion and approved certain warnings; that Oshkosh provided those warnings; and finally that Oshkosh warned the government about dangers known to them but not the Marine Corps.[10]

II. THE SEVENTH CIRCUIT CORRECTLY INTERPRETED THE GOVERNMENT CONTRACTOR DEFENSE AND GRANTED OSHKOSH SUMMARY JUDGMENT REGARDING PETITIONERS' DESIGN DEFECT CLAIMS.

With respect to Petitioners' design defect claim, the Seventh Circuit conducted an extensive analysis of the record and determined that Oshkosh had met its burden of proof on each element of the *Boyle* test and thus was entitled to summary judgment based on the government contractor defense. (App., pp. 9a-21a) However, Petitioners summarily argue that neither of the underlying federal courts followed its appropriate judicial role in

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[10] The uncontroverted facts establish that the Marine Corps, which had exclusive authority over the use of the MK-48 and the employment and training of its operators, was in a markedly superior position to monitor the effects of the use of the vehicle, and was, in fact, in possession of at least as much information on the dangers associated with the use of the MK-48 as Oshkosh. Additionally, it is clear that the Marine Corps was responsible for the selection and implementation of all testing but chose not to conduct any crash test. The Marine Corps did test for safety and human factors; however, they were not concerned with how the MK-48 would perform in a crash. (Wozniak Dep., p. 138 & Lanzdorf Dep., p. 86). Finally, there is no evidence of record to suggest Oshkosh was aware of any fires or explosions arising from any collision involving a MK-48. (App., p. 17a).

applying the *Boyle* test and summary judgment standards.[11] The government contractor defense is not solely a defense of fact, and courts can and have made rulings as a matter of law.[12] In fact, Oshkosh established each

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[11] Petitioners argue that a conflict exist among Circuits based on the application of the government contractor defense to failure-to-warn claims. However, there is no conflict as pointed out above. Aside from that issue, the Petitioners simply want this court to re-evaluate the lower courts' assessement of the facts. But this Court has consistently indicated that it does not grant certiorari to review evidence and specific facts – "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 69 S. Ct. 535, 93 L.Ed. 672 (1949). *See also, U.S. v. Johnston*, 268 U.S. 220, 45 S. Ct. 496, 69 L.Ed. 925 (1925), and *Texas v. Mead*, 465 U.S. 1041, 104 S. Ct. 1318, 79 L.Ed.2d 714 (1984).

[12] A review of the Seventh Circuit's decision indicates that it followed the principles handed down by *Boyle* and many other similar cases on point that have granted summary judgment. For example, the following is a list of cases that have followed the same *Boyle* approach and granted the government contractor's defense immunity on summary judgment grounds: *Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67 (3rd Cir. 1990); *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985); *Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019 (S.D. Ill. 1989); *Sundstrom v. McDonnell Douglas Corp.*, 816 F. Supp. 587 (N.D. Calif. 1993); *Lewis v. Babcock Industries, Inc.*, 985 F.2d 83 (2nd Cir. 1993); *Tozer v. L.T.V. Corp.*, 792 F.2d 403 (4th Cir. 1986); *Kleeman v. McDonnell Douglas Corp.*, 890 F.2d 698 (4th Cir. 1989); *Tate v. Boeing Helicopters*, 55 F.3d 1150 (6th Cir. 1995); *Wisner v. Unisys Corp.*, 917 F. Supp. 1501 (D.Kan. 1996); *Andrew v. Unisys Corp.*, 936 F. Supp. 821 (W.D.Okl. 1996), and *Fagans v. Unisys Corp.*, 945 F. Supp. 3 (D.D.C. 1996); *Butler v. Ingalls Shipbuilding Inc.*, 89 F.3d 582 (9th Cir. 1996); *In re: Air Disaster at Ramstein Germany*, 81 F.3d 570 (5th Cir. 1996); and *Russek v. Unisys Corp.*, 921 F.

element of the government contractor defense. In turn the Petitioners failed in their burden to present positive/affirmative evidence refuting the proffered evidence.[13]

The Petitioners virtually reassert the same arguments to this Court as they made to the underlying federal courts. Petitioners argue that issues of fact exist as to each element of the government contractor defense and therefore summary judgment is inappropriate. However, contrary to Petitioners' belief, the Seventh Circuit did not consciously overlook or fail to consider information provided to them with respect to each element of the government contractor's defense. In fact, the Seventh Circuit in analyzing the first element of the *Boyle* test determined that the Marine Corps approved reasonably precise specifications on the MK-48. The court ruled that:

> The government's participation in the design of the MK-48 was, in both a procedural and substantive sense, extensive. Procedurally, the design of the MK-48 evolved through a cooperative and 'continuous back and forth' between the Marine Corps and Oshkosh. *Harduvel*, 878 F.2d at 1320. The Marine Corps also exercised, through a detailed set of performance and dimension specifications, a considerable amount of substantive input into the design of the MK-48. The design process, viewed as a whole,

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Supp. 1277 (D.N.J. 1996). In sum, the government contractor defense is not solely a question for the trier of fact and can and has been decided as a matter of law.

[13] If the evidence is merely colorable, or is not significantly probative, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986).

establishes that the Marine Corps made a series of discretionary decisions concerning the design of the MK-48 and its suitability for military mission requirements.

The evidentiary material submitted to the district court established that Oshkosh and the Marine Corps worked closely together on the development of the MK-48 – from its planning stages through full production. The initial proposal called for the exhaust system to be placed on the right side of the vehicle, away from the single 55 gallon fuel tank on the left side. When the Marine Corps insisted on having a larger fuel capacity, however, a second tank was added to the right side of the vehicle. A second increase in the fuel capacity requirement resulted in the expansion of the twin fuel tanks to 75 gallons each, crowding the exhaust system even further. At one point during the design process, moreover, the government reduced the overall height limitation from 102 inches to 96 inches. This change in the height specification required the exhaust pipe, which lies directly above and parallel to the right side fuel tank, to be moved six inches closer to the fuel tank. It is clear, therefore, the Marine Corps did not leave 'the critical design decisions to the private contractor,' *Trevino*, 865 F.2d at 1480, but rather that the Corps worked with Oshkosh every step of the way. *See*, *Harduvel*, 878 F.2d at 1320; *Kleeman*, 890 F.2d at 700-01.

The Marine Corps needed the MK-48 to have two 75 gallon fuel tanks; the ability to ford through five feet of water; the ability to restart a stalled engine while fording; the ability to fit into an eight foot by eight foot by twenty foot

> shipping container, and the ability to be transported externally by helicopter. This combination of specifications cabined significantly the placement of the exhaust system and the fuel tanks. Each 75 gallon fuel tank requires over ten cubic feet of space, and the exhaust pipe itself is approximately twelve inches in diameter. The district court was justified in concluding, as a matter of law, that this combination of specifications prevented Oshkosh from complying 'both with its contractual obligations and the state-prescribed duty of care.' . . . Nor does the fact that Oshkosh may have retained some discretion to position the fuel tanks and exhaust system within the envelope permitted by the specifications, stand alone, defeat the government contractor defense. . . .
>
> The record in this case supports the District Court's conclusion that, given the Marine Corps involvement in the design process and its substantive input, the configuration of the field and exhaust systems amount to the type of deliberate trade-off between military mission requirements and safety concerns that is at the heart of the government contractor defense.

(App., pp. 10a-13a)

Government discretion, not government design, is the key to the government contractor defense. Therefore, the fact that the Marine Corps delegated "total design responsibility" to Oshkosh is immaterial. Petitioners have time and time again argued that the Marine Corps' delegation of "total design responsibility" to Oshkosh precludes Oshkosh in one way or another from asserting the government contractor defense. However, the trial court

and Seventh Circuit have found Petitioners' argument to have no basis in the law or facts.[14]

The Seventh Circuit determined that the second element of the *Boyle* test was met since the MK-48 conformed to the reasonably precise specifications set forth by the Marine Corps. Once again, contrary to Petitioners' belief, the underlying courts specifically assessed whether the configuration of the exhaust system and fuel tanks conformed to the reasonably precise specifications placed upon Oshkosh by the Marine Corps. In reaching its decision, the Seventh Circuit ruled that, "Oshkosh did not deviate from the Marine Corps specifications; rather, the configuration of the fuel tanks and the exhaust system was determined, to a significant extent, by the Corps' dimension, performance and operation specifications." (App., p. 16a) In other words, the placement of the exhaust system and the fuel tanks satisfied an intended configuration.[15]

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[14] The Seventh Circuit ruled out Petitioner's total responsibility clause argument both based on the timing of the production contract as well as the conduct of the parties. (App., p. 13a)

[15] On page 19 of Petitioners' brief, they suggest the Seventh Circuit ruled that, because it had previously found that the government approved reasonably precise specifications, it was foreclosed from determining that the design did not meet contract specifications. This is a complete mischaracterization of the court's decision and a thorough reading and analysis of the decision points this out. The Marine Corps was aware of the configuration of the exhaust system and fuel tanks and ultimately approved the design. (*Wozniak* dep., pp. 59, 66-67; *Lanzdorf* dep., p. 97; *See also*, R.40, Ex. B and Ex. E) The Petitioners fail to realize that this project was not created in a

The final element of the *Boyle* test requires Oshkosh to have warned the Marine Corps about the dangers in the use of the MK-48 that were known to Oshkosh but not to the Marine Corps. The Seventh Circuit specifically ruled that Oshkosh was not aware of any dangerous configuration of the fuel tanks and exhaust system that the Marine Corps was not. Furthermore, Oshkosh did not possess any greater knowledge than the Marine Corps concerning the likelihood of an exhaust-ignited fuel tank fire following a side-impact collision. (App., p. 17a)[16] The bottom line is that the Marine Corps was completely aware of the configuration of the exhaust and fuel system (it was open and obvious) and ultimately approved the design even though they had complete authority to change the design if desired. (Wozniak dep., p. 181) Finally, the court determined that to the extent Oshkosh was aware of a danger from the ignition of fuel, the warning contained in Oshkosh's Safety Assessment Report was sufficient to communicate the danger to the

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vacuum. In other words, there were other specifications which had to be met in order to reach the Marine Corps design and performance goals, and that is why Oshkosh was forced to place the exhaust system in close proximity to the fuel system. Moreover, the Marine Corps' review, testing and approval of the MK-48 design prior to final production, is evidence that the design conformed to Marine Corps specifications.

[16] Once again, the Petitioners completely mischaracterize the decisions handed down by the district court and Seventh Circuit on page 20 of their brief. The district court and Seventh Circuit both concluded that Oshkosh was not aware of any danger associated with the configuration of the fuel tanks and exhaust system that the Marine Corps was not. In other words, Oshkosh and the Marine Corps possessed the same knowledge about the exhaust system and fuel tank configuration.

government for purposes of the government contractor defense. (App., pp. 17a-18a)

The record contains unrebutted evidence that Oshkosh disclosed all known dangers regarding the MK-48. As discussed earlier, the Marine Corps was responsible for the selection and implementation of all testing, and if none was done with regard to determining whether the exhaust was likely to ignite the fuel supply, that decision rested within the Marine Corps. The Marine Corps has exclusive authority over the use of the MK-48 and the employment and training of its operators, which places them in a markedly superior position to monitor the effects of the testing and use of the vehicle. In fact, the Marine Corps elected not to conduct any crash tests with the MK-48. Finally, there is no evidence which suggests that Oshkosh was aware of any fires or explosions arising from any collisions involving a MK-48 before this accident. *Boyle* does not require the contractor to warn the government of every possible danger – only those known to it – and not to the government. *Boyle*, 487 U.S. at 512. Based on the above, the Seventh Circuit was justified in concluding that all three elements of *Boyle* test was satisfied as a matter of law.

CONCLUSION

For all the reasons set forth above, the Respondent respectfully requests that the Court reject Petitioners' request for a writ of certiorari.

Respectfully submitted,

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